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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL
AND THE EUROPEAN PARLIAMENT

**FOLLOW-UP TO THE CONSULTATION PROCESS RELATING TO THE
GREEN PAPER ON "PLURALISM AND MEDIA CONCENTRATION
IN THE INTERNAL MARKET - AN ASSESSMENT OF THE NEED
FOR COMMUNITY ACTION"**

SUMMARY

Introduction

I. The consultation process

A. Consultation method

B. Assessment of the consultations

II. Analysis of the consultations

A. Outline of positions

B. Analysis of the answers to the questionnaires

C. Observations on the comments

III. Analysis of the options following the first round of consultation

A. Commission position on the options

B. Conclusions

C. Timetable

CONTENTS

SUMMARY	2
RESUMÉ	4
INTRODUCTION	7
I. THE CONSULTATION PROCESS	9
A. CONSULTATION METHOD	10
1. EUROPEAN PARLIAMENT, ECONOMIC AND SOCIAL COMMITTEE AND MEMBER STATES	10
2. INTERESTS CONCERNED	10
B. ASSESSMENT OF THE CONSULTATIONS	11
1. QUANTITATIVE ASSESSMENT	11
2. QUALITATIVE ASSESSMENT	11
II. ANALYSIS OF THE CONSULTATIONS	12
A. OUTLINE OF POSITIONS	12
1. PARLIAMENT, THE ECONOMIC AND SOCIAL COMMITTEE AND THE MEMBER STATES	12
2. THE INTERESTS CONCERNED	13
B. ANALYSIS OF THE ANSWERS TO THE QUESTIONNAIRES	15
1. ANSWERS RELATING TO THE NEED FOR ACTION	15
2. ANSWERS RELATING TO THE CONTENT OF ANY ACTION	21
3. ANSWERS RELATING TO THE NEW TECHNOLOGIES	23
4. ANSWERS RELATING TO THE DEVELOPMENT OF NATIONAL RULES	23
C. OBSERVATIONS ON THE COMMENTS	24
1. THE SCOPE OF ANY ACTION	24
2. IMPLEMENTATION OF THE INTERNAL MARKET AND THE SAFEGUARDING OF PLURALISM	27
3. "LIBERALIZATION" EFFECT OF RULES ON PLURALISM	27
III. ANALYSIS OF THE OPTIONS FOLLOWING THE FIRST ROUND OF CONSULTATION	28
A. COMMISSION POSITION ON THE OPTIONS	28
1. OPTION I (NO ACTION BY THE COMMUNITY)	28
2. OPTION II (RECOMMENDATION CONCERNING TRANSPARENCY)	31
3. OPTION III (HARMONIZATION OF NATIONAL RULES ON MEDIA OWNERSHIP)	32
B. CONCLUSIONS	40
1. THE SCOPE OF THE DEBATE	40
2. A MORE DETAILED EXAMINATION OF CERTAIN QUESTIONS RELATING TO THE CONTENT OF AN INITIATIVE	41
3. DEVELOPMENT OF THE NETWORK OF INTERESTS CONCERNED IN MEDIA OWNERSHIP	43
C. TIMETABLE	44

Annexes

List of non-confidential written comments

List of European organizations invited to the hearing on 26 and 27 April 1993

Summary of the Green Paper

European Parliament resolution of 20 January 1994

Economic and Social Committee opinion of 22 September 1993

Information sheet on the disparities between national rules on media ownership

RESUMÉ

1. At the request of the European Parliament and some of the interests concerned, in January 1993 the Commission asked all interested parties to participate in a wide-ranging consultation process on the basis of the Green Paper on "Pluralism and media concentration in the Internal Market - an assessment of the need for Community action". Now, more than a year later, the time has come to engage in a preliminary stock-taking exercise. This is happening at a turning point in the history of the media sector in Europe and will contribute towards implementation of the Commission's policy of promoting the information society, for which the associated imperatives were set out in the White Paper on Growth, competitiveness and employment. In this respect the present communication is an initial response to the report by the High Level Group ("Bangemann Group") set up by the European Council to put forward proposals on the information society. That report highlights among other things the detrimental effects on the Internal Market of the disparities between national rules on media ownership.
2. The purpose of the consultations on the Green Paper was to provide the Commission with the information it needs if it is to adopt a position on the sensitive issue of the need for Community rules on media ownership. The Green Paper had identified a number of obstacles to the proper functioning of the Internal Market caused by disparities between national rules on ownership of the media (television, radio and the press). The purpose of these national rules is to maintain pluralism by limiting access to media ownership by a single person, in particular by preventing cumulative control of, or holdings in, several media companies at once. The Green Paper showed that these disparities bring with them the risk of restrictions on the free movement of media services between Member States and on the freedom of establishment of media companies, considerable legal uncertainty, and restrictions - or distortions of competition. It concluded by proposing three options, although the Commission did not express any preference for any one of them at that stage. Option I consists in taking no action at Union level; Option II is a recommendation aimed at facilitating the exchange of information between Member States in the interests of transparency of media ownership; and Option III consists in harmonizing national restrictions on media ownership.
3. During the consultation process, which lasted over a year, opinions were received from the European Parliament and the Economic and Social Committee, both of which came out in favour of Option III. The Member States were consulted and they stressed the lack of any difficulties which might have justified Option II.

4. The consultations afforded the opportunity above all of gathering comments from the interests concerned, including both individual operators and the associations representing them at European level. The consultations developed a momentum of their own: the rate at which people made contact or sent in written comments remained steady and positions evolved over time. The replies to a complementary questionnaire sent out last summer revealed a change in the attitude of the interests concerned. Opinions may still be divided, but a majority of operators are now against the status quo (Option I) and in favour of a change in the existing regulatory framework governing media ownership. Positions are, on the other hand, even more divergent or less explicit on the question of the level (European or national) at which such a change should occur.

5. This general situation seems to be due to a number of factors:

Among the obstacles to the Internal Market identified in the Green Paper, the consultations revealed, more particularly, that the lack of legal certainty stemming from the current regulatory patchwork was a disincentive to investing in European media. This limits the opportunities for media companies to make the most of the growth potential of the Internal Market, and hence to play a more active part in promoting pluralism.

The new political and economic environment of the "information society", the importance of which was stressed in the Commission's White Paper on Growth, competitiveness and employment, has added a further dimension to the drawbacks caused by the lack, at Union level, of a common set of rules on media ownership. Globalization of the media industry and the new information technologies require that maximum use be made of the freedoms of the Internal Market in order to facilitate the transformation of this sector into a European industry which is both competitive and modern and which can perform to the full its essential role in the working of our democracies. This is why the introduction of a regulatory framework geared to the information society is one of the priority objectives of the White Paper, and why the High Level Group's report stresses the importance of a European approach to ending the patchwork of national rules on media ownership.

In order to adapt to this new environment, national laws on media ownership will evolve, and indeed are already evolving, in some Member States. Globalization and the development of the new information technologies are revealing a number of shortcomings in national laws on media ownership and necessitate their amendment. The prospect of such national legislative activity, uncoordinated at Union level, is likely to accentuate the damaging effects on the Internal Market of the disparities between national rules, foremost among which is fragmentation of the market.

6. Now that the European media industry is at a watershed, and in view of the importance which the Commission, like Parliament, attaches to the maintenance of pluralism, a Community initiative on media ownership might prove to be necessary. If this were to be the case, such an initiative should enable the internal media market to function, and in particular should facilitate the exercise of freedom of establishment for media companies and the free movement of media services in the Union, and at the same time maintain pluralism in the face of certain concentrations. It would provide both a maximum of legal certainty for investments in the media sector and a safety net preventing concentrations which represent a threat to pluralism and which cannot be dealt with under conventional competition-law rules.

7. The Commission will launch a second round of consultation with all the parties concerned having the dual objective of:
 - . rejecting or confirming the need for a Community initiative;
 - . in the event that such an initiative would prove necessary, define its limits

INTRODUCTION

At the request of the European Parliament¹ and some of the interests concerned, in January 1993 the Commission launched a wide-ranging consultation process on the basis of the Green Paper on "Pluralism and media concentration in the Internal Market - an assessment of the need for Community action"².

By adopting the Green Paper, the Commission sought, at the same time as providing a basis for discussion, to stress the importance which it attaches to preserving pluralism in the frontier-free area which is the Internal Market. The freedoms of the Internal Market cannot be put into practice at the expense of pluralism; on the contrary, their implementation helps to strengthen that market through the opportunities which it gives both citizens and the media.

The purpose of the Green Paper was to assess the need for action at Community level in the light of the disparities between national rules on media ownership. Since the middle of the 1980s all the Member States have introduced rules on media ownership. The purpose of these is to limit operators' freedom in order to and preserve pluralism. Four types of provision can be distinguished:

- Limits on monomedia concentration. These prevent the same person (natural or legal) from controlling or having an interest in several media of the same type at once, e.g. a ban on having more than "x" television stations or more than "x%" of the capital of a second station, if the operator already controls a TV station;
- Limits on multimedia concentration. These prevent a single person from controlling (or having an interest in) several media of different types, e.g. a newspaper company cannot control a television station, or a television station cannot control a radio station;
- Limits on shareholdings in a radio or television company which apply irrespective of *how many other media* are controlled, e.g. in some Member States it is impossible, even for a person who does not own any other media, to hold more than 25% of a television station;
- Limits concerning "disqualified persons". These prohibit certain types of operator or body from holding a radio or television licence or authorization, e.g. some Member States lay down that public bodies, local authorities, religious or political organizations and advertising agencies are "disqualified persons".

¹ Resolution of 15 February 1990 on media takeovers and mergers, OJ No C 68, 19.3.90, pp. 137-8. Resolution of 16 September 1992 on media concentration and diversity of opinions, OJ No C 284, 2.11.92, p. 44.
² COM(92)480 final, 23 December 1992.

Having emphasized that these rules vary widely between Member States (see Annex 7) and having analysed the impact of this diversity on the Community, the Green Paper summed up the analysis of the question of the need for action as follows:³

"In the light of the objectives of the Community and of the analysis carried out here the need for possible Community action can be described as follows:

1. *The objective of ensuring pluralism, as it is understood and pursued by the Member States, does not as such create a need for Community intervention. The operation of the Community is not in itself a threat to pluralism; quite the reverse, it may have a positive effect on two factors which determine the level of pluralism: the number of broadcasters and newspapers and the diversity of their controllers. Member States have the legal capacity to safeguard pluralism, particularly where there is real circumvention. The only possible sources of difficulty are tension between national authorities regarding the definition of circumvention and questions regarding the transparency of media ownership and control.*
2. *Among the methods used by Member States to safeguard pluralism, the disparity between the anti-concentration rules specific to the media constitutes an obstacle to the functioning of the single media market:
it may result in restriction of the free movement of services where there is circumvention
it may result in restrictions on freedom of establishment
it may produce restrictions on competition
it may distort competition
it may cause legal uncertainty regarding the question of circumvention
it limits access to media activity.
Any need for action on the part of the Community, then, has more to do with ensuring that the Internal Market functions properly than with maintaining pluralism as such.*
3. *For the present the obstacles are for the most part potential obstacles, because the relevant laws are recent and the strategies adopted by operators are often still national.*
4. *Potential obstacles can be seen mainly in broadcasting, and particularly television broadcasting, which has the highest measure of regulation. The press is affected essentially by multimedia ownership rules rather than monomedia rules.*
5. *The restrictions on media ownership which underlie the obstacles identified are not incompatible with Community law."*

The Green Paper concluded by proposing three options, without the Commission expressing a preference for any one of them at that stage. Option I consists in taking no action at Union level; Option II is a recommendation aimed at facilitating the exchange

of information between Member States to promote transparency of media ownership; and Option III consists in harmonizing national restrictions on media ownership.

Both the method and the scale of the consultations were justified in view of the importance the Commission attaches to the question of maintaining pluralism in the media and the complex and sensitive nature of the issue. Equally, in the context of the implementation of the principle of subsidiarity, a thorough approach was required to allow the need for action and the added value of action at Union level to be accurately identified.

The specific consultations on the Green Paper have been enriched by the work and the report of the High Level Group of prominent persons representing the interests concerned ("Bangemann Group"), set up by the European Council to put forward proposals on the "information society". The rapid changes in the technological and economic environment of all the media sectors inevitably throw up new topics for discussion during the consultations. It is generally accepted that digital technology is capable of transforming all media sectors by changing the economics of communication, the patterns of interdependence between sectors and the relations between the supplier of the service and the consumer.

The results of the consultation process and consideration of the principle of subsidiarity, notably the reality of obstacles to the freedoms of the Internal Market and the new dangers of fragmentation of the Internal Market created by the new rules currently being decided separately in several Member States, lead the Commission to the conclusion that an initiative at Community level might prove to be necessary. The Commission believes that it is therefore advisable to continue the consultation process. This should, in addition to enriching the information already gathered by the Commission, permit the latter to reject or confirm the need for an initiative and, in the latter case, allow it to have at its disposal all the key factors essential for the determination of its content. This content should be balanced and address the fundamental challenges to society posed by the safeguarding of media pluralism.

In the interests of transparency and in view of the wealth of information gathered in the course of the consultation process, the Commission wished to submit in this communication an interim report informing Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of the analysis it has made of the first round of consultation and of the follow-up it proposes.

I. THE CONSULTATION PROCESS

In launching the consultations, the Commission had in mind not just a formal consultation of interested parties but to launch a genuine process with an in-built momentum featuring a frank and open dialogue with operators. This process has led to the creation of a kind of network of persons and operators interested in the question of pluralism and media ownership.

A. Consultation method

1. EUROPEAN PARLIAMENT, ECONOMIC AND SOCIAL COMMITTEE AND MEMBER STATES

As soon as it was adopted, the Green Paper was transmitted to Parliament and the Council. The Commission also asked the Economic and Social Committee to deliver an opinion on it. The consultations took place above all with the business circles concerned, the aim being to assess the impact on the Internal Market of the disparities between national rules on media ownership. Over and above the transmission of the Green Paper to the Council and the Member States' participation in the hearing attended by the interested business circles, the Commission wished to deepen the consultation with the Member States through a questionnaire on the transparency of media ownership. Only the national authorities were capable of furnishing the Commission with information on obstacles to the exchange of information between Member States relating to media ownership.

The Green Paper formed the subject-matter of an exchange of views at a ministerial seminar in Mons on 5 October 1993, in the course of which the Ministers for Cultural Affairs underscored the need to raise awareness among national business circles about the consultations under way.

2. INTERESTS CONCERNED

A *twin-track consultation process* was used, consisting of consulting on the one hand the federations and associations representing industry interests at European level, and on the other individual operators and all other interested parties. This twin-track approach made it possible to obtain both the common positions of European associations and federations and individual factual contributions on the specific problems encountered by the interests concerned.

A *hearing* attended by European associations and federations was held on 26 and 27 April 1993 (list of participants attached). Only European organizations were invited owing to space constraints but the positions of other interested parties were in any event taken fully into account.

A *complementary questionnaire* was sent to all interested parties on 28 July 1993 following receipt of the preliminary reactions to, and comments on, the Green Paper. The purpose of this questionnaire was to obtain more information on four specific points: the impact of the new technologies, the potential development of national rules, the real-audience criterion and the control criterion.

In addition, *numerous contacts and informal bilateral meetings* took place between the relevant Commission department and the interests concerned. Participation in conferences and symposia helped increase the latter group's awareness of the need to take part in the consultations.

In the interests of transparency, the written contributions received were gathered together, except where the originator withheld permission, in five volumes which were distributed among those who so requested. These can be obtained by sending a written request to the following address:

European Commission, DG XV/E-5, C 107 8/59, 200 rue de la Loi, B-1049 Brussels;
fax: 32-2-296 17 36.

B. Assessment of the consultations

1. QUANTITATIVE ASSESSMENT

Numbers. Altogether, more than 70 sets of written comments on the Green Paper and the complementary questionnaire were received by the Commission. Of these, 25 emanated from European federations or associations and the remainder came either from individual operators or from national federations or private individuals.

Geographical origin. Among the comments from interested parties other than European industry federations, those originating in the United Kingdom, Germany and Italy were the most numerous. Some positions were received from the Netherlands, France and Greece. No contributions were received from operators in other Member States.

Origin by sector. About twenty written contributions emanated more particularly from the television sector, while some fifteen positions came from the press, six from the radio sector, eight from multimedia operators, and five from journalists' federations and employees in the media sector.

2. QUALITATIVE ASSESSMENT

(a) Momentum of the consultations

The Commission was at pains to ensure that the consultations built up and maintained a momentum, which meant doing more than just waiting for written comments to come in. In the event, the regular contacts between the department concerned and interested parties and the dispatch of a complementary questionnaire helped create a dynamic which worked well. The complementary questionnaire thus made it possible to gather positions from operators who had not yet submitted comments on the Green Paper as well as from those who had. There were more new participants in the consultation process than participants who had ceased to play the consultation game.

(b) Representativeness of the positions

With regard to the European industry federations, it is difficult to determine precisely whether the positions accurately reflect the views of all the operators involved. However, with regard to individual operators, the Commission notes with regret that the bulk of the positions come from just three Member States, namely Germany, Italy and the

United Kingdom. Operators from the other Member States were disinclined to submit formal contributions, despite the fact that some of them had established formal contact with the Commission's departments.

(c) Quality of the information

The contributions from parties other than European associations or federations provided a large number of specific and useful items of information. The positions of the European associations and federations are more a reflection of compromises which sometimes contain ambiguities or inconsistencies inherent in a collective decision-making process. The radio associations played an active part in the consultations and provided an insight into a modern and dynamic medium.

It is important to note that many of the European federations' positions were presented at the spring '93 hearing in a provisional form and that, in most cases, these positions have been neither confirmed nor called into question by definitive positions. The associations and federations have preferred instead to reply subsequently to the complementary questionnaire and to modify their positions through these replies without formally confirming their initial comments or otherwise.

Lastly, the low participation rate among consumer associations is to be regretted in view of the essential role they have to play in this sphere.

II. ANALYSIS OF THE CONSULTATIONS

The results of the consultations cannot be presented in a simplified and schematic form owing to the many nuances, hesitations or distinctions which characterise the contributions and positions of the interests concerned. Moreover, a number of misapprehensions need to be cleared up by the Commission.

A. Outline of positions

1. PARLIAMENT, THE ECONOMIC AND SOCIAL COMMITTEE AND THE MEMBER STATES

(a) Parliament

Parliament adopted an opinion on the Green Paper on 20 January 1994.⁴ It comes out in favour of **Option III subsection c** (creation of an independent committee). It accordingly calls on the Commission to draw up a proposal for a directive "firstly harmonizing

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OJ C 44, 14.2.1994, p. 177.

national restrictions on media concentration and secondly enabling the Community to intervene in the event of concentration which endangers pluralism on a European scale" (§ 1). It asks that an independent committee, or "European Media Council", be set up. It provides some details as to the content of the proposal for such a directive, and calls on the Commission to propose a directive on access to information held by national and Community authorities and a directive safeguarding the independence of information, and to put forward proposals concerning a European media code of conduct to maintain professional ethics.

(b) The Economic and Social Committee

The ESC adopted an opinion on the Green Paper on 22 September 1993.⁵ It came out in favour of **Option III**. Like Parliament, it calls for the drafting of a proposal for a directive and considers sub-option C (establishment of an independent committee) to be "both reasonable and effective" (§ 4.7).

(c) The Member States

The specific questionnaire sent to the Member States in July 1993 has shown that **there is no need that justifies Option II** because at the present time there are no real difficulties in exchanging information relating to the transparency of media ownership. As regards the choice between Options I and III, Member States took a waiting position, not wanting, so it seems, to take up a position at this stage before knowing the results of the consultations with the interests concerned. One Member State wished to state its position on the options in the Green Paper in writing.

2. THE INTERESTS CONCERNED

Generally speaking the industry's position can be stated as follows: **the current national rules on media ownership must change, in particular so as to cope with globalization and the impact of the new technologies. On the other hand, the question of the level - national or European - at which the change must occur is the subject of vague or divided positions.** This is due to the fact that those in the industry hesitate to take a position on this question without knowing the exact content of the rules. Some of them had the impression that the Commission was asking them to sign a "blank cheque". This position emerged recently when the complementary questionnaire was being answered.

In view of the complexity of the posed questions, the diversity of the interests concerned and subtle variations between the comments, it is not possible to distinguish between and regroup the various positions according to the names of the originators. Dividing

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OJ C 304, 10.11.1993, p. 17.

lines have, however, shown up clearly according to the type of operator concerned. Five dividing lines are clearly visible in the industry, depending on the operators concerned:

(a) According to the scope of the operators' strategy: European strategy/national strategy

Those operators who have a strategy of establishment (acquisition of holdings in, or control of, media companies) in the different Member States are the first to be interested in a common rule of the game in the Community which is both fixed and stable and which offers the legal essential to investment in this sector, where the risks and cost of access are already particularly high. On the other hand, those operators who have a strategy of establishment in their national market are less interested in a common rule except if they are adversely affected by distortions of competition (see below).

(b) According to the operators' activities: monomedia press activities/multimedia activities

Some operators who have a monomedia press strategy can see no point in Community action in so far as they are not victims of the disparities between laws on media ownership. Only France and Italy have specific rules limiting monomedia concentration by means of "mechanical" thresholds. Because such rules do not exist in the other Member States, the effects of the disparities are less important than in the case of multimedia activities or monomedia broadcasting concentration. By contrast, multimedia operators (or monomedia TV and radio operators) are more favourably disposed towards Community intervention because they may come up against the effects of the disparities between the rules that have been introduced in all Member States.

(c) According to the operators' origin: open market/closed market

Operators carrying on activities in a country where the rules on ownership are liberal are sometimes worried that investors might concentrate on their market rather than go to other countries where access to ownership is less liberal. The best-known example, which predates the Green Paper, is that of the British television company ITV, which voiced these fears in view of the fact that in the United Kingdom a single operator may have 100% of the capital of an ITV station whereas in other Member States holdings are limited to a maximum of 25% (as in Greece or Spain) or to less than 50% (as in Germany and, since recently, in France).

(d) According to the operators' experience: new entrants/established operators

New entrants have an obvious interest compared with established operators. The latter have had to find their feet in a recently enacted national regulatory environment and are therefore sometimes unfavourably disposed towards any action which might destabilise it. By contrast, new entrants who wish to invest in the media sector with an industrial

approach wish to have a legal framework which liberalizes market access and removes the legal uncertainty of the current regulatory patchwork. Thus, certain established media operators have expressed concern at the entry into the media market of the large telecommunications companies.

(e) **According to the duration of a strategy: short-term strategy/long-term strategy**

The consultations also revealed a difference between companies with a long-term strategy and those with only a short-term strategy or no strategy at all. The latter are sometimes tempted to prefer the status quo to a Community initiative. By contrast, operators who have a long-term strategy are on the whole in favour of such an initiative inasmuch as they view the Internal Market more as an opportunity than a threat.

B. Analysis of the answers to the questionnaires

1. ANSWERS RELATING TO THE NEED FOR ACTION

At issue here are the answers to questions 1 to 3 and 5 of the Green Paper questionnaire⁶.

(a) **Protection of pluralism**

As regards the safeguarding of pluralism as such, Parliament, the Economic and Social Committee, the journalists' federations and the trade unions said there was a risk that pluralism might be affected and that this justified action at European level. Parliament, in particular, in its resolution of 20 January 1994, considers "that national media legislation alone was no longer sufficient to safeguard diversity of opinion and pluralism in Europe" (recital A); that "media concentration and cross-ownership are increasing in the Community (and that) once established, such cross-ownership, where it reduces diversity of opinion, is difficult to reverse" (recital C) and, lastly, that "there is a need

⁶ **QUESTION 1:** The Commission would welcome the views of interested parties regarding the need for action, and in particular on:

any cases where the Community dimension of media activity has meant that restrictions on media ownership imposed for the purpose of maintaining pluralism have become ineffective, for example because they are circumvented or because of transparency problems;

the existence of restrictions or restrictive effects other than those identified here;

practical instances where ownership restrictions have actually impeded the activity of economic operators in the sector;

the sectors and activities which are especially affected by restrictions on ownership (for example, is the press subject to restrictive effects not only in respect of multimedia aspects but also in respect of monomedia aspects?).

QUESTION 2: The Commission would welcome the views of interested parties on whether the needs identified are of sufficient importance, in the light of Community objectives, to require action in the media industry and, if so, when such action should be taken. **QUESTION 3:** The Commission would welcome the views of interested parties on the effectiveness, in the light of Community objectives, of action which would be taken solely at Member State level. **QUESTION 5:** The Commission would welcome the views of interested parties on the desirability of action to promote transparency which would be separate from a harmonization instrument.

to harmonize national legislation which imposes restrictions on the media in order firstly to prevent them being evaded and secondly to safeguard the operation of the Internal Market, thereby at the same time increasing the competitiveness of the European media" (recital E).

(b) Transparency of media ownership

Action relating to transparency separate from rules on media ownership (Option II) is rejected by Parliament and the ESC, which consider that both types of measure should be dealt with together. Opinions among the interests concerned are more divided: those who are hesitant about, or against, rules on media ownership tend to support action in relation to transparency, whereas those who are in favour of Option III are opposed to such action. An independent national supervisory authority came out in favour of Option II. The answers to the questionnaire sent to the Member States in July 1993 generally indicate that for the time being there are no obstacles to the exchange of information. Those who are in favour of Option II sometimes understood this option as covering all problems of transparency, including the quality and effectiveness of national rules, whereas in fact it concerned only the question of the exchange of information relating to transparency.⁷

(c) Reality of the obstacles to the Internal Market identified in the Green Paper

At the end of a legal analysis, the Green Paper specifies that the Member States may legitimately, in certain cases, take measures limiting the application of the principles of the Internal Market in order to preserve pluralism - an objective of public interest. Thus, a number of obstacles to the functioning of the Internal Market are identified: television channels' *freedom to retransmit* (Article 59) between Member States may be restricted in the event of a genuine circumvention of the legislation on media ownership, and media companies' *right of establishment* (Article 52) in the Member States may be restricted. In addition, it is possible for there to be *distorsions and restrictions of competition*; *legal uncertainty* may discourage investment and damage the competitiveness of media enterprises; lastly, in a general way, *access to media activities* may be limited. The consultation process, which lasted over a year, showed that the obstacles were real.

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Part Four, Chapter 5, §II "If there were really a need with regard to transparency, this would be to make it easier for information to be gathered and exchanged between the authorities concerned by means of a legal obligation on media enterprises to disclose information (so that, where appropriate, controlling interests can be identified) and on the competent authorities to communicate information to other authorities. For this purpose a recommendation could be proposed or, if necessary, a legal instrument."

(i) *The disparity of the rules discourages direct investment in media enterprises and the exercise of the right of establishment*

The consultations demonstrated that the obstacles to the Internal Market show up in decisions not to make any direct investments, i.e. not to set up, or take a stake in, a media company. Setting up a media enterprise - be it a new company, a subsidiary, a restructuring operation, acquisition of control or a merger - is a project which takes time and carries risk since everything depends ultimately on an authorization being given by a national authority. Thus, the obstacle becomes tangible more as the result of a process that culminates in a decision not to invest in an establishment project than in the shape of a decision by a competent authority not to grant a licence, thereby giving rise to a formal dispute.

This observation is confirmed by two phenomena: first, the undercapitalization of media companies in certain Member States or the difficulties they have in raising capital (problems of finding new shareholders, or conflicts between shareholders) and, second, the recent investments by European operators in non-European markets (operators reported that since there was no genuine Internal Market for the media they preferred to invest on the American market or in the new markets of Asia). The economic analysis in the Green Paper, which drew on a study by a consultant, had already shown that direct investments between Member States in media companies are fairly limited, apart from in the magazine sector, which is in fact not covered by the rules on media ownership.

The disparities between national rules act as a deterrent for two reasons:

- Disparities give rise to legal uncertainty about the legitimacy of any national measure rejecting licence applications on account of shareholdings in or control of media in the other Member States. The legality for the purposes of Community law of such a measure, which has been foreseen under several national legislations, would have to be examined in the light of its proportionality to the objective pursued. The result of such a scrutiny is very risky and uncertain. The uncertainty is furthermore accentuated by the fact that the rules on media ownership sometimes vague which is the source of conflicts, as for instance those in Germany over the definition of controller (disputes between two Länder authorities) and in France (purchase of the newspaper *Dernières Nouvelles d'Alsace*). Legislative disparities and legal uncertainty mean that setting up a new media enterprise will entail search costs. This is not a negligible item, especially for small media ventures such as radio stations. Contacts with lawyers, e.g. at conferences and seminars on the Green Paper, confirm that operators commission research at substantial cost in addition to the usual market research.

- The disparities between national systems of law produces *restrictions of competition* and induce operators to engage in "forum shopping" - identifying investment prospects more in terms of the national legislative framework than in terms of market opportunities. Operators have stressed that this can lead to investment decisions which are inefficient or conclude not to invest at all. Some national markets are thus "protected" from new competitors, which facilitates mergers between operators already there. The argument that the latter are subject to the same restrictive rules as those who want to gain access to the market is not relevant, since the operators already there have the advantage of having had time to become established and to influence the legal framework ("fief" effect).

(ii) *Disparities create legal uncertainty about the free movement of broadcasts*

The Green Paper analysed the question of circumvention at length and concluded that the Member States could legitimately restrict the free movement of a channel which circumvents legislation on media ownership (by broadcasting, for instance, via satellite from another Member State) if the measure were proportionate to the objective of pluralism. Through this condition of proportionality, which requires an examination of each individual case, the Green Paper recognized the importance of the grey area of legal uncertainty which exists to distinguish genuine circumvention from the action of an operator who is only using the opportunities of the Internal Market.

The consultations showed that circumvention of rules in a way which threatened pluralism was regarded as a plausible scenario in particular by Parliament, even if for the moment there had been no clear instance of it. On the other hand, some operators seem preoccupied by the possibility that a Member State might invoke the circumvention argument in the case of activities which did not constitute one. In this respect, it should be noted that in the case of infringement proceedings the objective of pluralism has been used several times by the Member States to justify measures limiting the free movement of television broadcasts or the freedom of establishment. The national measures in question in these cases did not, however, involve rules on pluralism and media ownership. A fortiori, this means that the risk of the rules on media ownership being invoked by a Member State to challenge a broadcast from another Member State will increase as cross-border activities expand.

(iii) *Disparities expose operators to distortions of competition*

Already back in 1992, the UK television channel ITV formally drew the Commission's attention to the distorting effects of the disparities between the rules on media ownership.

Various operators reported that the difference between their national rules and those of the other Member States made it hard for them to compete against media enterprises from other Member States which had been able to grow under fewer constraints.

During the consultations, operators expressed fears about fragmented liberalization at Community level, i.e. only in their Member State. This could have the result of exposing them to competition from large groups from other Member States or non-member countries which were attracted by the national market thus liberalized. In this respect, media operators were worried about telecommunications operators, who were preparing, in the context of the information society, to enter the media market and who would be the first to be interested in liberalization by a Member State acting alone.

- (iv) *The opportunities afforded by the new technologies and the Internal Market cannot be fully used within the current legal framework*

This was the virtually unanimous conclusion of all operators: at a time when the new technologies (digital transmission, compression and convergence) make it possible and essential to cross national frontiers, the current legal framework is inappropriate. The rules were drawn up at a time when frequencies were scarce, whereas, from now on, digital technology will increase the technical capacity to create new channels (by a factor of between 6 and 10). The inappropriateness arises not only out of the nature of the national rules but also from the disparity in national approach, for the investment needed to implement these new technologies requires that markets be found at Community level. It is not enough therefore for one Member State alone to adapt its rules, because an operator established there would encounter obstacles when exporting the new media services to other Member States whose legislation on media ownership did not offer the same opportunities.

One of the strategies cited most by operators consists in broadcasting a bundle of specialized channels (made possible by digital compression) to a small target audience; to be profitable, this must have a cross-border dimension. While these clusters could be lawful in certain Member States, they would not be in others whose legislation restricts the number of channels. Legally, the outcome of any dispute that might arise is very uncertain, for an assessment would have to be made in each case of whether, given the principle of proportionality, a Member State can legitimately restrict such broadcasts. Another example of the uncertainty of the current legal framework which could cause problems for cross-border broadcasting lies in the definition of the televised media (are electronic newspapers covered by the current rules?) or in the application of ceilings to shareholdings in a television channel.

- (v) *The new technologies and the legislative reactions to them will increase the significance of the obstacles to the Internal Market in the short term*

The consultations showed that as a result of the new technologies, operators are now thinking in terms of the new media and new European markets to make their exploitation profitable. In this respect, the obstacles to the Internal Market will have a quite different effect in the very short term:

- the expansion of cross-border media activities as a result of the new technologies increases the risk of conflicts or disputes arising out of the disparities between national rules;
- the obstacles to the Internal Market could become even more important since, faced with the new technologies, national rules are changing and may become even more disparate. In Germany, the competent authorities in the Länder have started work on the revision of the ownership rules in the "Rundfunkstaatsvertrag"; in Belgium, a debate has been launched on the impact of digital technology; in France, a new law has now liberalized the rules on the maximum shareholding in a television company, and a report by the Conseil Supérieur de l'Audiovisuel (CSA) proposes that the anti-concentration rules be amended; in Italy, there has been a public debate about media ownership for some years; in the Netherlands, a code of conduct has just been drawn up to limit monomedia concentration in the press; and in the United Kingdom a review of the rules on multimedia ownership has been launched with a view to their liberalization. With these developments in the national rules there is a real risk that national approaches will become even more disparate if there is no coordination at Community level. Such disparity is already apparent with regard to the general objective: in some Member States (e.g. the United Kingdom or France), the changes are intended to liberalize the current framework in order to face up to world competition, whereas in other Member States (Germany or the Netherlands) the debate focuses more on increasing the effectiveness of supervision. Another cause of this disparity is that the starting point for these changes varies considerably since current rules and national markets are already very dissimilar. Without a Community framework for these legislative developments, therefore, there is no chance that a natural alignment between national rules will occur;
- lastly, faced with the globalization of the media industry, European media companies will not be sufficiently competitive on the international scene if they cannot exploit the opportunities for development provided by the Internal Market.

(d) The quality of national rules

The *quality of national rules* on media ownership was often criticised, in particular to draw attention to the need to facilitate access by operators to media activities.

The radio sector, in particular, underscored this aspect in view of the difficulty of obtaining authorisations or licences. This question reveals the existence of pressure to bring about changes in national regulatory frameworks.

(e) Competitiveness of the industry

The *importance* of the objective of promoting the industry's competitiveness, in assessing the need for action, was stressed, in particular by publishers and multimedia operators, owing to the globalization of the media industry and the development of new technologies.

2. ANSWERS RELATING TO THE CONTENT OF ANY ACTION

At issue here are the answers to questions 4 and 6 of the Green Paper questionnaire and to questions C and D of the complementary questionnaire.⁸ The question of the content of any action was both omnipresent in the positions voiced and paradoxically treated with little precision and substance in the contributions received. Many participants in the consultation process tended to link the question of the need for action to that of the content of such action, whereas they are two separate questions which can be answered separately.

The *setting-up of a European committee* was called for by Parliament and the ESC, but on the other hand is objected to by a majority of the business interests concerned.

The question of the coverage of monomedia press concentration. The consultations revealed, on the one hand, that operators in two countries (F, I) with an automatic

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QUESTION 4: The Commission would welcome the views of interested parties on the content of a possible harmonization instrument as envisaged above, and in particular on the two variants for its scope, on the use of the real audience as a basis for setting thresholds, on the demarcation of distribution areas, on any other possible references, and on ways of defining the concept of controller. **QUESTION 6:** The Commission would welcome the views of interested parties on the desirability of setting up a body with competence for media concentration. **QUESTION C1.** Given that a criterion of potential audience (like the population covered by a satellite footprint) would be too restrictive, what type of audience measurement might be utilised, in particular for multimedia and monomedia concentration of radio and television enterprises (for example, "audience share" for television, "daily reach" for radio, number of dailies sold for newspapers)? **Question C2.** With reference to criteria used in national arenas, namely the number of channels, will the audience criterion offer more opportunities to access the market, namely for thematic (i.e. special-interest) channels (by reason of their small audience)? **Question C3.** What might the necessary conditions be to make a system using thresholds based on audience levels workable (compatibility, comparability, equivalence, etc.)? Is it possible to have a single audience criterion applicable to multimedia or is it necessary to have several distinct criteria applicable to each medium or combinations of media? **Question C4.** Might it be deemed necessary to have complementary criteria such as, for example, that of language of the media, that of the type of radio station or TV channel concerned, that of the number of licences granted at the same time, etc.? **Question C5.** Should the fixing of thresholds leave a discretion to the Member States to set stricter limits for operators established on their territory? **Question D1.** Is it necessary to go further than existing company law to define media control in specific rules? **Question D2.** What comments can be made on the definitions used for media controllers in current national regulations? **Question D3.** What elements should a definition contain bearing in mind the objectives of effectiveness, adaptability to the Community framework, and compatibility with existing systems as well as the economic and technological effects that could result?

limit on monomedia press concentration wished to be no longer discriminated against compared with the other Member States which have no such limits and, on the other, that operators in the other Member States were opposed to the extension of this type of limit in their country.

The *audience criterion* envisaged in the Green Paper⁹ was commented on several times in fairly general terms. Three points of view were expressed: it is a logical criterion but one which poses problems of feasibility; it is an inadequate criterion which needs to be accompanied by economic criteria (such as revenue); it is not a good criterion. The majority of comments fell into the first two categories. The question whether a single, integrated multimedia criterion can be used was answered in a variety of ways. It should be noted that the audience criterion gave rise to misunderstandings and that, in the intervening period between the answers to the Green Paper questionnaire and those to the complementary questionnaire, positions evolved, the criterion being viewed in a more favourable light. Some operators were under the mistaken impression that the criterion might penalise the growth of an existing television channel, whereas in fact it would be used only in the context of an application, to a national authority, for authorisation to set up a new channel or to take over (or acquire a shareholding in) an existing channel.

The *media controller criterion* also envisaged in the Green Paper¹⁰ was the subject of very few specific comments. However, the majority of contributions stressed that it would be necessary to lay down specific rules which go further than existing company law in defining control.

The question of *persons ineligible for media ownership* (disqualified persons) was considered important by Parliament, which asks, in particular, that advertising agencies should not be allowed to run newspapers or radio or television companies and vice versa.

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The Green Paper envisages using the audience criterion for setting restriction thresholds limiting access to media ownership: in order to award a license to a new television channel (or to authorise the acquisition of control of an existing television channel). The national controlling authorities should determine if the media audience already controlled by the applicant for a license does not exceed the threshold fixed by the directive, for the broadcasting zone of the new channel.

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It is a question of finding a definition that allows the person or operator controlling a media enterprise to be identified in order to apply the audience criterion limiting access to ownership.

3. ANSWERS RELATING TO THE NEW TECHNOLOGIES

At issue here are the answers to question A of the complementary questionnaire.¹¹

All the answers stress the sizeable impact of the new technologies, in particular digitalization, compression and convergence, which will make it possible to increase the number of television channels, appreciably modify commercial strategies and increase globalization. The positions stress that the current rules on media ownership are unsuitable owing, especially, to the methods they use, in particular the criterion of the number of channels controlled by a single operator, or the definitions of broadcasting (does it cover electronic publishing?). The contributions also stress the importance of new technologies for the publishing sector. Some operators in the radio sector raised the problem of access to technologies, in particular DAB (Digital Audio Broadcasting), and stressed the risk of further concentration which they involve. Other positions, on the other hand, point to the need to increase the flexibility of the anti-concentration thresholds to the extent necessary for the development of the new broadcasting technologies. Some questions deserve to be examined more thoroughly, such as those related to the economic ties of the media operator both upstream and downstream and those concerning the pattern of vertical integration.

4. ANSWERS RELATING TO THE DEVELOPMENT OF NATIONAL RULES

At issue here are the answers to question B of the complementary questionnaire.¹² In general, the answers mentioned the existence of regulatory or pre-regulatory

¹¹ **Question A1:** Identify the new technologies or those under expansion which will affect the market (distinguishing namely between those which, from the point of view of the consumer, will replace existing technology and those which will be of a more complementary nature, giving details of the expected time scale for implementation of these technologies). **Question A2:** What economic impacts will be foreseeable at the Community level, in particular on the market structure and on the strategy of operators within the internal market? This evaluation will not have to be all-encompassing but should be carried out on a technology-by-technology basis. It is important to give precise information about the access costs to these technologies, in particular for the consumer and the operators. **Question A3:** What impacts will be foreseeable on the national statutory arena in regard to media ownership? Does current national legislation covering media ownership permit, or, on the contrary, limit, the development of these new technologies (explain the effect of any limitations)? **Question A4:** To what degree could the new technologies develop conditions for the granting of authorizations or licences applicable to television or radio operators? In particular, which conditions, besides those relating to pluralism, could be envisaged?

¹² **Question B1:** Are you aware of any proposals for new anti-concentration rules, in the Member States, specific to the media? What is their origin and objective? **Question B2:** Would you welcome a change in the applicable regulatory framework? **Question B3:** What factors could change the national regulatory framework in the future (new broadcaster authorisations, case law developments, political debates, ineffectiveness of national rules, over-stringent rules, etc.)? **Question B4:** How long did it take to draw up the current regulations and were you involved in the process? **Question B5:** Could these possible changes accentuate or attenuate the regulatory disparity between the Member States of the Community?

activity in several Member States, and a number of positions stressed the risks of an increase in the disparities between national rules.

C. Observations on the comments

The consultations revealed a number of misapprehensions which need to be cleared up.

1. THE SCOPE OF ANY ACTION

(a) *Questions relating to access to information and the exercise of journalistic activities*

In its position Parliament asked the Commission to propose certain other measures apart from those on media concentration, namely a directive on access to information held by national and Community authorities, a directive safeguarding editorial independence, and a code of conduct on professional ethics. The Commission would point out in this connection that the questions dealt with in the Green Paper were defined in the light of the Community's competences and the principle of subsidiarity.

As regards the request for a *directive on access to information held by national and Community authorities*, the Commission acknowledges that the questions of transparency and access to information are important. It was with this in mind that it presented two communications to the Council, Parliament and the Economic and Social Committee, one on transparency in the Community,¹³ and the other on public access to the institutions' documents.¹⁴ These two communications underline the Commission's concern to implement a policy of transparency at the level of the Union's institutions, especially by means of an interinstitutional agreement. They do not, however, tackle the issue of access to information in the Member States in so far as such matters are already dealt with at national level in accordance with approaches specific to each Member State. In this context, regulatory intervention at Union level is not justified in the light of the Internal Market as the disparities between national rules on these questions do not create obstacles which ought to be removed by harmonization.

As regards the *media code of conduct on professional ethics* and the *framework directive safeguarding journalistic and editorial independence*, in view of the Community's competences and the principle of subsidiarity these matters cannot be dealt with at Community level but are a matter for the Member States. In the first place, such questions are not always dealt with by regulatory means, being instead governed by

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COM(93) 258 final, 2 June 1993.

¹⁴

COM(93) 191 final, 5 May 1993.

codes of ethics which do not concern the legislator, and in the second place, where statutory rules do exist, the differences between Member States do not seem to cause any problems for the functioning of the Internal Market such as would justify their harmonization.

(b) Question relating to internal pluralism

The question of internal pluralism has given rise to a number of misunderstandings which have led to several requests being made that public channels be excluded from the scope of a possible directive on media ownership. This is a sensitive issue and the Commission is of the opinion that the specific nature of public channels must be taken fully into account in determining the content of any rules. However, any automatic or a priori derogation would require an in-depth analysis along the following lines:

First of all, a partial harmonization, i.e. a harmonization which would not cover all cases of concentration, might not remove the obstacles to the Internal Market created by the disparities between national rules.

Secondly, if the content of the directive prevents media concentrations above a certain level, all cases of concentration must be covered, including those involving public channels, in which case their public service missions should however be taken into account.

Thirdly, public channels sometimes behave like private operators when implementing a diversification strategy which could lead to, for example, the creation of new channels which are not subject to the same public channel internal pluralism obligations.

Fourthly, the interests at stake must not be confused: harmonization of regulations on media ownership would not in any way call into question the specific characteristics of public broadcasters, including their public service and internal pluralism obligations.

Lastly, there is no substitutability between internal pluralism measures and external pluralism measures: although the general objective is the same, namely to ensure pluralism, the specific objective pursued by these two types of measure in attaining the general objective is different: internal pluralism measures seek to ensure diversity of opinion within a channel's programmes; external pluralism measures seek to ensure diversity of opinion, not within a channel's programmes, but through the independence and autonomy of the different media offered to the public. It is thus not possible to offset any non-application of external pluralism measures by the application of internal pluralism measures.

(c) *The question of the interface between general competition law and the specific rules on media ownership*

Some comments expressed doubts about the interface between the specific rules on media ownership and general competition law.

(i) *Impossibility of replacing the specific rules on media ownership with general competition law*

As stated in the Green Paper,¹⁵ even if competition law can contribute to pluralism, it cannot cover every situation because the maintenance of competition and the maintenance of pluralism are two different objectives which call for different assessments. That is why the Member States have adopted specific rules on media ownership in parallel with domestic competition law.

Moreover, *however effective competition law may be*, the disparities between specific national rules on media ownership remain, as does their impact on the functioning of the Internal Market.

Reducing the thresholds in the Merger Control Regulation,¹⁶ which has sometimes been put forward as a solution, would therefore not solve the problems created by the disparities between specific national rules on media ownership.

(ii) *Risk of overlap with competition law*

Conversely, some comments seem to call for a specific rule covering situations which fall more under the sphere of competition law. This is the case in particular with concentration in the advertising industry or with the vertical relationship between a producer and a right-holder, which can be dealt with by applying national or Community competition law (Merger Control Regulation, Articles 85 and 86 of the Treaty) without

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Part Four, Chapter II, Section 1, Subsection 2. Because of the different nature of the two instruments (competition law/ specific rules relating to the media), situations could exist in which pluralism might be threatened without actual competition being hampered in a significant way in the Internal Market or a substantial portion of it. This could result from the definition of the markets in question which makes it difficult to take a internal market for multi media activities into account and lends itself to a separate examination of each market in question. For example, from the media consumer's point of view, who listens to the radio, reads a newspaper and watches television, a multi media concentration could mean that all the media he receives are under the control of the same controller, even if the sections of the media markets controlled by that same person in each of the markets in question are not large enough to hamper competition.

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In this connection, the Commission decided, in its July 1993 report on the application of the Merger Control Regulation, to wait before making a proposal to revise the thresholds. The matter will be considered before the end of 1996.

it being necessary to draw up new, specific rules. Similarly, the effective application of competition law can cover situations relating to systems for controlling access to the new technologies (encryption) which could limit access by certain firms to the new media market. This is incidentally why, at national level, the specific domestic rules on pluralism do not generally cover this type of situation.

2. IMPLEMENTATION OF THE INTERNAL MARKET AND THE SAFEGUARDING OF PLURALISM

On a number of occasions in the course of the consultations several participants seemed to draw a contrast between the objective of completing the Internal Market and that of safeguarding pluralism. In the Commission's view, such a contrast is not justified. The Internal Market is not a "free market" in which all restrictions are to be removed.

Indeed, the Green Paper emphasises that the national rules are pursued an essential general interest (to guarantee pluralism) and therefore only a community harmonization of these general-interest rules could put an end to the restrictions caused by their disparities on the free movement of services and the freedom of establishment.

Therefore, in so far as the proper functioning of the Internal Market calls for a set of rules, these would at the same time seek to maintain pluralism in the face of media concentration. In other words, Community intervention based on the establishment and functioning of the Internal Market is not in itself contrary to the general interest requirement of preventing concentrations which endanger pluralism which cannot be covered by the application of competition law alone.

3. "LIBERALIZATION" EFFECT OF RULES ON PLURALISM

Some participants in the consultation process expressed doubts about the possibility of liberalizing anti-concentration systems using rules on pluralism. However, there is no contradiction between regulation and liberalization. On the contrary, only a set of Community rules would permit, where appropriate, a certain type of liberalization. There are three reasons for this:

- it would reduce the number of rules confronting operators in their European activities (by replacing 12 different sets of legal provisions with a single set);
- it would remove the obstacles to the Internal Market identified above (in particular the lack of legal certainty in the event of circumvention of the law) by removing the disparities between laws;

- the third reason concerns not the Community added value peculiar to any "Internal Market"-type harmonization, but the quality of the content of the legal instrument. The task here will be, in accordance with the principle of proportionality, to define a content which does not go beyond what is necessary in terms of the objective to be attained and which strikes a delicate balance between the need to facilitate access to media activities and the need to prevent pluralism-threatening concentrations which cannot be stopped solely by applying competition law. The effectiveness of competition law will need to be taken into account when it comes to determining the content and liberalizing effect of a regulation since the object of the rules would be to cover only situations which are dangerous from the point of view of pluralism and which cannot be covered by competition law. Other situations, by contrast, would be covered only by general competition law. An instrument which caused confusion or created an overlap between competition law and the specific rules would prevent genuine liberalization without providing a better guarantee of pluralism. Moreover, the quality of the rules will depend on the ability to take into account the context of the new technologies. In this respect, the use of the audience criterion would, in the Commission's view, be likely to safeguard the maintenance of pluralism more effectively while being less harsh than the criterion of the number of channels owned by the same operator.

III. ANALYSIS OF THE OPTIONS FOLLOWING THE FIRST ROUND OF CONSULTATION

A. Commission position on the options

Overall, the consultations confirmed the analysis, which identified the obstacles to a Internal Market and the three possible options. It is not the purpose of this communication, therefore, to pinpoint the potential obstacles again, and the reader is referred to the Green Paper for a fuller explanation. A potential need for action has been identified, but a final decision as to that need, i.e. concerning in this case one or other of the options, has to be assessed for its appropriateness. In this particular case, given the specific characteristics of the question involved, the Commission has assessed the various possible options on the basis of four criteria: which option best lends itself to the achievement of the Community's objectives (teleological criterion)? Which option is best suited to the prospect of change (diachronic criterion)? What is the impact of the options (impact criterion)? And which option is most consistent with the other Community initiatives (consistency criterion)?

1. OPTION I (NO ACTION BY THE COMMUNITY)

(a) Achieving the Community objectives

If the Commission were to take no action, the objectives of the Internal Market would not be achieved in the media sectors. The obstacles to the functioning of the Internal Market,

which were identified in the Green Paper, in particular the lack of legal certainty as to the free movement of services and the freedom of establishment, would persist and could not be removed by other types of measure. Option I would mean that the status quo concerning access to media ownership would be acceptable for the purposes of the Internal Market.

(b) Prospects for change

The legal systems of the Member States are currently distinguished by substantial but contrasting legislative trends. Whereas in France and the United Kingdom there is a tendency towards liberalization, in the Netherlands there are stricter rules (a professional code of ethics was recently adopted setting traditional limits on monomedia concentration in the press), and the question is the subject of debate in Germany and Italy.

It is difficult to see how such trends can lead spontaneously to the de facto approximation of national rules if there is no institutional framework at Community level. The political and economic context specific to each national system will mean that legislative trends will be driven by a specific logic. One need only look, for instance, at how the question of multimedia concentration is treated in the different countries.

It should be noted that this rule-making activity is set to increase further. There are two reasons for this. First, the traditional definitions relating to television activities and the quantitative criterion of the number of channels controlled by a single operator (laid down in the rules in order to limit media concentration) are unsuited to the new context of a multiplicity of channels (new technologies) and are going to lead, in the short or medium term, to changes in the legislation. Secondly, the implementation of operators' global strategies, and in particular the entry of telecommunications operators in the market, will result either in a demand for liberalization by traditional media operators already in the market or, conversely, in pressure for these new situations to be regulated.

(c) The impact of not taking action

Political impact. A decision not to take action would run counter to the wishes clearly expressed by Parliament and the Economic and Social Committee. This could have repercussions on the relations between Parliament and the Commission or the Council in future matters relating to the media, particularly as regards the follow-up to the White Paper. Not to take action would also run counter to the concerns expressed in the report of the High Level Group, which asks the Commission to react to the current situation regarding media ownership and to the possibility that it might deteriorate. Failure to take action would be interpreted by the industry as a sign that the Community does not intend

to formulate a public policy of encouraging direct investment in the media sector. At Member State level, a decision to take no action could, possibly, accord with the wishes of some national authorities, who might be reluctant to see the Community intervene in a sensitive area. However, if no action is taken, the expansion of the media's cross-border activities could increase the risk of tension between the national authorities responsible for granting licences or authorisations. Political pressure at national level to take measures concerning media concentration would also markedly increase.

The *economic impact* of a decision not to take action can be assessed in accordance with two possible short-term scenarios: (a) fragmented liberalization, i.e. in one or a few Member States only, and (b) the maintenance of the status quo or the intensification of national restrictions.

On the supply side, irrespective of the scenario, the fragmentation and compartmentalisation of markets, and the resultant lack of legal certainty would have the general effect of discouraging investment, from within the Union and outside, in the European media and would reduce the competitiveness of the European media industry in the context of the increasing globalization of the sector.

In the event of fragmented liberalization, the Member States liberalizing access to media ownership could receive, in the short term, a considerable flow of investment from operators in third countries or other Member States which have not liberalized their system. Depending on its scale, such investment could, by reaction, encourage the country concerned to reintroduce regulatory barriers in the medium term. Even if the flow of investment were massive, it would still be less than if liberalization were carried out at Union level, since the liberalized national market would not be large enough for launching new, innovative services. Liberalization with a view to promoting the creation of information highways by allowing telecommunications operators to enter the media market would not be very effective at national level and would encourage national monopolies or national champions. As the national market is limited, telecommunications operators, in order to get a return on the investments necessary for the information society, will have to acquire a strong position on that national market and hence integrate vertically with the media services sector. By contrast, the emergence of a strong, competitive sector in cross-border media services, using information highways, would limit the extent of vertical integration of telecommunications operators and would encourage the creation of genuinely European information highways.

If the status quo is maintained, the European market will not attract potential international investment in the media. The new technologies entail costs and increasingly require

operators to go for cross-border niche markets involving several Member States. Yet the current legal fragmentation, complexity and uncertainty make such a cross-border approach difficult and discourage the investment which the implementation of such a strategy requires. In addition, traditional national players in the media sector would try to expand in other markets around the world (e.g. Asia, Central and Eastern Europe), which would result in a loss of investment in the Union. In some cases, maintaining the status quo would, to the detriment of new potential players, mean no shake-up of current operators - the rules on media ownership have made it necessary to develop very complex alliance strategies often dictated by a particular political context - and would encourage strategies that were national only. In the long term, such enterprises, "protected" by closed rules, will no longer be competitive on the world media, and in particular the multimedia, market.

On the demand side, the potential choice for European media consumers will be limited, and imports of media, especially multimedia, services from third countries such as the United States will probably increase. However, the European media consumer will not be the target for new, innovative services but rather will consume the services supplied in those third countries.

(d) Coherence

Option I would create problems of consistency with regard to Community activities. The information services sector and, in particular, the audiovisual sector receive priority treatment, as the White Paper and the recent Green Paper on the competitiveness of audiovisual programmes show. Consequently, it could be inconsistent to devise a European policy solely for those aspects which relate to the exploitation of television programmes or audiovisual works while not concerning oneself with direct investment, i.e. with the financing of the media companies. Furthermore, the press, radio and multimedia sectors could challenge the priority given to the audiovisual sector.

2. OPTION II (RECOMMENDATION CONCERNING TRANSPARENCY)

(a) Achieving the Community objectives

A recommendation designed simply to facilitate the exchange of information between national authorities concerning the transparency of media ownership will not make it possible to achieve the Community objectives, in particular those of the Internal Market. Such a measure would not put an end to the disparities between national rules which are the cause of the obstacles to the Internal Market. Of course, this does not mean that the Commission regards the transparency of media ownership as unimportant. It means, rather, that this is not a subject which as such requires specific action at Community level. Indeed, the Member States' answers in this respect showed that there were no real obstacles to the exchange of information. Moreover, questions concerning the quality of

national rules for ensuring transparency can be dealt with more effectively at national level. On the other hand, if rules on media ownership were established at European level, rules on transparency and the exchange of information would be needed to implement them.

(b) Prospects for change

The globalization of information activities should increase the requirements of the national supervisory authorities with regard to the exchange of information. However, it is difficult to argue that this will necessarily increase the obstacles to the exchange of information.

(c) Impact

The option would have little economic impact, since it would be aimed primarily at national supervisory authorities and not at companies. The information would not necessarily be of the same type as that likely to interest companies, in particular with regard to their merger and acquisition strategies. In addition, the conditions of confidentiality would be different, since it would be information transmitted to the public authorities for the purposes of monitoring obligations relating to pluralism.

(d) Coherence

This option would be difficult to fit in with the other initiatives concerning the media, but would not create problems of incompatibility.

3. OPTION III (HARMONIZATION OF NATIONAL RULES ON MEDIA OWNERSHIP)

(a) Achieving the Community objectives

(i) *The objectives of the Internal Market*

The consultations tended to confirm the analysis in the Green Paper¹⁷ concerning the obstacles to the Internal Market created by the disparities between the national rules on media ownership. Consequently, to achieve in the media field the objectives of the Internal Market set out in Article 7a of the Treaty, it is necessary to adopt Community rules on media ownership. Such common rules would put an end to the disparities between national rules concerning the media and would make it possible in particular to do away with the two obstacles most often cited during the consultations, namely the lack of legal certainty, which restricts the exercise of the freedom of establishment and the free movement of media services and which consequently discourages direct investment in the media, and the distortions of competition created by the differences in the levels of restriction. The Community objective justifying action at Community level is the guaranteeing of the functioning of the Internal Market while safeguarding the requirement to preserve pluralism by fixing certain limits on media ownership.

¹⁷

See above, §II.B.1.

(ii) *The objectives of the Internal Market in the context of the information society*

Community rules on media ownership would also contribute to the priorities set out in the White Paper entitled "Growth, competitiveness, employment. The challenges and ways forward into the 21st century" and would meet the concerns expressed in the report of the High Level Group. The five priorities set out in the White Paper for the implementation of the information society include the creation of a suitable regulatory environment, requiring in particular the removal of distortions of competition. In this respect, it is clear that the current situation as regards media ownership could have a negative effect on the launching of projects relating to the information society. As the White Paper explains, the success of the information society will depend on the development of the services transported by the networks. The greater the prospects for the profitable operation of bundles of varied services with a high added value (education, culture, distance selling, health, games, entertainment, practical guides, etc.), the easier it will be to recoup investment in infrastructure. Sound and audiovisual media and multimedia services will have an essential role to play in the short term. Development of these services is a precondition for the development of the infrastructure. This is therefore an essential strategic objective which requires special regulatory treatment of the question of media ownership for three reasons:

- *The obstacles to the free movement* of services and to the right of establishment created by the current regulatory patchwork will limit the opportunity for operators of the traditional media to supply their services on the information highways. The regulatory obstacles to the free movement of information society services may result not only from the conditions relating to the content of the services but also from those relating to the supplier of those services. Thus, by limiting the opportunities to become a supplier, the disparities between national rules on media ownership also restrict the opportunity to supply more services and hence, to a certain extent, the viability of the information society project. The prospects for information highways thus have the effect of radically amplifying the disadvantages resulting from the lack of suitable European rules.
- *The scenario of dismantling* all rules on media ownership is unrealistic and open to challenge. Some operators pointed out during the consultations that the very principle of having to have rules on media ownership would disappear because of the quantity of channels available. The Commission would observe first of all that the dismantling of national rules on media ownership is not yet a reality, whereas there is a real need now to make the media industry more competitive. The debate developing in some Member States is not about dismantling but about adaptation, in the form either of greater flexibility (liberalization) or of greater effectiveness in achieving the objective of

pluralism. Secondly, from the substantive point of view, the question of external pluralism will persist even in an environment where frequencies are no longer scarce. The multiplication (by a factor of between 6 and 10) of the number of television channels does not prevent the fact that they could all be controlled, in theory, by a single operator. The possible reduction of the risk of concentration in control of the media does not make protection against the unacceptable consequences of its possible occurrence any less desirable.

- *That the national rules on media ownership are unsuited* to the new information technologies was frequently emphasised during the consultations by the interests concerned and by the High Level Group. Most often, the method used to measure concentration was regarded as unsuitable because the criterion of the number of channels was inappropriate in a multichannel environment where frequencies were not scarce. Excessive restrictions on the multimedia were also challenged since they limited the possibility of using information highways to provide a bundle of media services. Lastly, the degree of concentration accepted was sometimes regarded as too restrictive in view of the competitiveness needed to cope with the globalization of the media industry.

(iii) *The contribution of harmonization to pluralism*

Implementation of the Internal Market objectives will help to ensure that pluralism is better protected. The consultations highlighted that a common set of rules concerning media ownership would make the protection of pluralism more effective by:

avoiding "havens" which would enable operators who are not entitled to control a medium to circumvent this prohibition by broadcasting via satellite from another Member State which allowed such control. Even if, legally, the Member States receiving the broadcasts in question could act to prevent them being retransmitted on their territory, putting such protection into practice could, in some cases, be risky from a technical and political viewpoint, for it might lead to disputes between national authorities (on a national level, there is the DSF affair in Germany, where the authorities in two Länder are disputing the legality of authorizing a new channel). A common set of rules, by contrast, would have the effect of forcing Member States to ensure an equivalent level of protection, if necessary by introducing new provisions which some Member States did not have before;

properly covering cross-border activities, which are going to expand increasingly as a result of the new technologies. National rules are unsuitable as a means of dealing with cross-border activities, particularly in certain cases where they fail to take into account the effect on other Member States of a licence to broadcast a television channel which will be received in those Member States. In addition, since the provisions will be the same, it will be easier to ensure the transparency and monitoring of media ownership as the national authorities will have to look for the same type of information;

applying control at source rather than at reception. In accordance with the principle of home country control and of mutual trust, the competent national authority for granting an authorization or a licence will have to take into account not only the interest of citizens on its territory but also that of citizens in the other Member States who might be able to receive the channel in question. Thus, the public interest to be preserved does not stop at national borders but at the frontiers of the Community, and the European responsibilities of the national supervisory authorities will be clearly defined. Supervision and any prevention will be more effective, since they will be aimed directly at the enterprise in question rather than at intermediaries (cable distributors, manufacturers of receiving equipment, etc.);

improving the quality of the regulatory framework by taking the positive experiences of different Member States into account. The second round of consultations should make it possible to hold such an exchange of experience and satisfy the quality requirement which the objective of preserving pluralism imposes. Moreover, discussions at Community level help to escape the purely national interference that may occur in a national legislative process and affect its consistency and quality;

the criteria envisaged will provide more effective protection: the actual audience criterion would be a more effective way of guaranteeing pluralism than the number of channels, since a single channel may have a substantial audience and, hence, considerable influence. Conversely, an operator may be penalized for having several channels when they are in fact specialized channels with extremely small audiences, providing extra pluralism. The controller criteria, as a means of identifying the operator responsible for the media whose audience is measured, makes it possible to go beyond a formal definition (majority shareholder), which does not take account of the de facto control of the media;

not letting the media in certain countries be put at a disadvantage or threatened compared with the media in other Member States simply because the latter are subject to laxer rules on media ownership which have enabled them to acquire a certain size.

(iv) *The Community objectives and the European independent committee*

The consultations did not throw much light on the advantage of setting up a European independent committee to achieve the Community objectives, or on the gains that it would bring as regards the Internal Market. As far as the role of the committee is concerned, care should be taken not to set up a new type of committee. In this respect, the role desired by Parliament, i.e. that the committee should express an opinion on specific mergers, could clash with the principle of subsidiarity and be inconsistent with the basic principles of "Internal Market" control. In this regard, unless the particular circumstances

so warrant, it is the competent national authorities which should, as the authority in ordinary law, apply directly the national rules transposing a Community rule without centralisation at Community level. The need for such a committee should therefore be assessed, at the appropriate time, in the light of the substance of the Community initiative.

(b) Prospects for change

Foreseeable developments indicate that action should be taken concerning the ownership of the media. Such action will (a) make it possible to create the structural conditions that are essential if advantage is to be taken of the new environment of globalization and (b) avoid the risks of uncoordinated national legislative reactions.

The new technologies and the new economic environment. The new technologies (digital television, compression and convergence) will have a considerable impact on the development of the media market. In particular, the new technologies encourage the globalization of markets and will therefore have the effect of increasingly confronting the media industry with the competition from operators in third countries. The latter could be more competitive than European operators, either because of their position on their home market or because they are new entrants to the media industry and come from a sector where companies are much larger than traditional media operators.

The political and legal environment will probably evolve in the short to medium term on account, first, of the pressure from traditional media operators to change it and, second, of political concern about the tendency towards vertical integration by telecommunications operators entering the market for information society services.

(c) Impact

(i) Political impact

At European level, Option III would accord with the desire expressed by Parliament and the Economic and Social Committee, which have come out clearly in favour of a directive on media ownership in conjunction with the establishment of a committee. The Commission is aware that the selection of Option III would be a proportionate response to the concerns expressed by Parliament on several occasions. Option III would also be a response to the report of the High Level Group.

At national level, Option III might possibly generate certain misunderstandings if action by the Community is interpreted as being an extension of the Community's powers. In this respect, the Commission would point out that the power to act in this matter derives from the Community objective of the establishment and functioning of the Internal Market (Article 7a of the Treaty), which, in this particular case, would require

harmonization of the national rules on pluralism limiting media ownership so as to abolish the restrictions on freedom of establishment and the free movement of services. Action on media ownership would not therefore result in widening the scope of Community powers but would lie within the traditional framework of powers associated with the Internal Market.

Setting up a committee of wise men, as envisaged in Option IIIc, could have a considerable impact on the institutional organization of broadcasting in the Member States. One of the suboptions in Option III proposes that a committee be set up consisting of representatives from the independent national authorities responsible for radio and television. Such authorities exist in certain countries only (e.g. the Medienanstalten in Germany, the ITC in the United Kingdom or the CSA in France). In other Member States, independent radio and television authorities do not exist, or if they do they have no real powers or simply an advisory role. If this option is selected therefore, it would be necessary to establish such independent authorities in those Member States which do not have them. Failing this, the committee would not be really representative, since some of its members would have no particular experience at national level. Given that it has not been clearly established how far the committee would make it possible for the objectives of the Union to be achieved more effectively, the Commission thinks it would be preferable to wait for its proposal to be formally adopted before commenting on the advisability of proposing such a committee. It will then be a matter of determining, in particular, whether such independent authorities have been established in the Member States which do not yet have them.

As to the choice of the instrument, and without prejudice to any other form the Community initiative might adopt, a regulation might be an effective solution since it would guarantee maximum legal certainty for the economic operators and avoid instances of poor transposition or even no transposition at all. However, the advantages of a directive might be particularly appropriate where the subject is politically so sensitive: it would provide a certain flexibility of transposition, would constitute a general framework allowing national authorities a certain discretion, and would give a special role to national parliaments. In view of the political impact which action on media ownership could have, the Commission believes therefore that it would be better to use a directive as a basis.

(ii) Economic impact

The economic impact of any rules will depend, obviously, on their content and is difficult to assess at this stage. However, the establishment of a single regulatory framework for media ownership has an economic impact in itself, irrespective of the content.

On the supply side, common rules in the field of the media, and the legal certainty which this would provide, would have the effect of opening up access to the market and, in particular, of stimulating direct investment in the media sector. Such investment could

come above all from new entrants. Hitherto, the specific limits in each country on access to media ownership, and the often politicised environment of media activities, have spawned "barony" strategies rather than industrial strategies and encouraged companies to structure their capital in a complex web of shareholdings. The adoption of European rules not connected with the specific circumstances of each Member States should encourage investors, who have hitherto been reluctant to invest in such a legally and politically complex and uncertain environment.

Such investment could provoke restructuring and a tendency to concentration which must be covered by the rules. The new niche markets that will be developed as a result of the information society will be both risky and costly (on account of the technology used and uncertainty about the potential demand for new media services). Operators will therefore tend to minimise such risks through a strategy of alliance or acquisition and concentration so as to reduce the number of players and attain a sufficiently large critical mass to cover the necessary rates of investment.

On the demand side, the decompartmentalisation of national markets would expand certain markets or create new ones. The niche markets of the special-interest media could be affected to a greater extent. While the resources supplied at national level for a niche market are often inadequate, they could be appropriate if the formula were applied extensively at European level. Rules on media ownership could enable those operators who wished to do so (for economic reasons), to follow more easily an establishment strategy whereby a company would become established in each territory in order to adapt its media service to a particular public. Ownership, the niche concept and the know-how are European, but the "product" is adapted to each public. Traditional national markets might thus be subject to such an establishment strategy by operators from other Member States. Lastly, it should be noted that common rules would facilitate the development of markets for the cross-border dissemination of television or radio services by limiting the lack of legal certainty surrounding cross-border broadcasting by television channels not in conformity with national provisions on media ownership. Information highways will increase the opportunities for cross-border broadcasting not only for new services but for traditional media such as sound radio and will heighten the risk that operators will be accused of circumventing national legislation.

To sum up, it is clear that opening up national markets with regard to media ownership should encourage direct investment in the media sector, particularly from new entrants, and result in a trend towards restructuring and concentration. The advantage of establishing a safety net to avoid media concentrations which threaten pluralism might therefore become clear, as might

the advantage of determining that net at Community level. As well as there being a safety standard guaranteeing pluralism, investment in the media sector would be stimulated by the openness of the market and the legal certainty provided by a single European regulatory framework. By contrast, if the safety net were still determined at national level, investment would be discouraged and the competitiveness of national operators would be limited by the strategies of "national champions" and "barons" and by complex, fragmented shareholdings. Lastly, the importance of the quality of the content of the common rules is just as clear, since it should have to fulfil its fundamental purpose of preventing concentrations which threaten pluralism while not being disproportionate so as to facilitate as much investment as possible in the media sector.

(d) Coherence

Option III is connected with the Community's other current initiatives relating to the media.

The White Paper on Growth, competitiveness and employment, and the report of the High Level Group. As emphasised above, Option III accords with the logic of the approach adopted in the White Paper to bringing about the information society and with the proposals of the High Level Group. An initiative on media ownership would be one of the measures needed to adapt the regulatory framework to the information society. The objective of making the media industry more competitive will have to be taken into account when determining the substance of any measure.

The Green Paper on Strategy options to strengthen the European programme industry in the context of the audiovisual policy of the European Union. The Green Paper initiated a debate on a number of strategic options for the audiovisual programmes industry. This Green Paper differs from that on pluralism and media concentration in scope, which does not cover all the media but only the audiovisual sector, and in its object, which does not relate to ownership of the media but to the promotion of the production and distribution of programmes.

Digital Video Broadcasting. An initiative on media ownership is also fully in keeping with the logic of the current work on digital video broadcasting which should result in both operators and suppliers of services being guaranteed the widest possible access to the new technologies.

Competition policy. An initiative on media ownership would be consistent with and complementary to the application of competition law. Its objective would not be to safeguard competition but to safeguard pluralism through rules on media ownership to the extent needed to ensure the proper functioning of the Internal Market.

The possibility of taking other measures to promote pluralism is already provided for by Article 21(3) of the Merger Control Regulation. The substance of this initiative should be strictly proportionate to the general interest (preservation of pluralism) so as to provide maximum security in this respect but without duplicating efforts or embracing situations which may be covered by competition law.

B. Conclusions

Having analysed the results of the consultation process, which lasted more than a year, the Commission has reached the conclusion that it should, in view of the challenges posed by the safeguarding of media pluralism, launch a second round of consultation with all the parties concerned and in close contact with the Member States.

This second stage of the consultation process will be useful to confirm or reject the need for a Community initiative, especially taking into consideration the development of the new technologies, and in the event of an initiative being proposed, it will give the Commission the opportunity to deepen the questions concerning its potential content in order to assure its quality.

One could hypothesise that such a Community initiative could be based on the following lines:

1. THE SCOPE OF THE DEBATE

The obstacles to the functioning of the Internal Market, identified in the Green Paper and created by the disparities between national rules on media ownership, and their potential negative effects on pluralism, have recently assumed a new dimension. Regarded at first as potential, these obstacles are becoming increasingly apparent and tangible. The globalization of the media industry and the development of new information technologies make it essential to transform the media sector into a genuine, competitive European industry capable of energetically playing its specific role in the operation of democracy. Accordingly, the completion of the Internal Market is both a necessity and an opportunity.

The national regulatory framework for media ownership will evolve, or is already doing so in some Member States, so as to adapt to this new situation. As the report of the High Level Group emphasises, the prospect of such uncoordinated legislative activity threatens to accentuate still further the harmful effects of the disparities between national rules on the new media services. Isolated, merely national responses to the globalization of the media would threaten to fragment the Internal Market still further and might rapidly become ineffective or even counterproductive by preventing the economic development of media operators, which is essential to pluralism, and the cross-border movement of their services.

2. A MORE DETAILED EXAMINATION OF CERTAIN QUESTIONS RELATING TO THE CONTENT OF AN INITIATIVE

Hitherto, the consultations have largely concerned the question of the need for common rules at European level on media ownership. They have confirmed, however, that the broad guidelines laid down in the Green Paper concerning the possible architecture of an initiative on media ownership provide a good starting point. Without prejudice to the conclusions the Commission might draw from the second stage of the consultation process, the latter will have to examine the following questions in particular:

(a) A balanced general approach

The object of the initiative would be to enable operators fully to exploit the opportunities created by the Internal Market, in particular freedom of establishment for media companies and the free movement of media services, and at the same time to maintain pluralism by preventing concentration of the media. The initiative would establish both the maximum legal certainty needed for investment in the media sector and a safety net preventing cases of concentration which threatened pluralism and which cannot be combated by the traditional rules of competition law. A stable legal framework which would not weaken the protection of pluralism in the Member States and which would guarantee an equivalent level of protection within the Union.

The conditions relating to media ownership which should be applied by the competent national authorities when they grant an authorization or a licence for a new broadcasting medium (television or radio) or when control is newly acquired of an existing broadcasting medium, should be examined on the basis of the orientations foreseen by the Green Paper. Given the scope of current national legislation, these conditions should apply at least to those cases where an operator applying for a licence for a radio station or television channel already controls a radio station or television channel (monomedia radio or monomedia television concentration) and where the operator applying for a radio or television licence already controls a medium of a different type such as a newspaper publishing firm (multimedia concentration). The question of the coverage of mergers between press enterprises (monomedia press concentration) will have to be examined during the second round of consultations, taking into account the fact that only two Member States have laid down specific rules in their legislation. In accordance with the principle of proportionality, these conditions should not go beyond what is necessary to achieve the fixed objectives and should therefore strike a balance between the need to guarantee the diversity of media controllers and the need to facilitate access to media activities so as to promote the development of the media industry. During the new consultations, therefore, the implications in terms of the degree of constraint of the various conditions that might be contemplated will have to be determined in order to be certain of their proportionality. In the light of the analysis in the Green Paper of the substance of a possible initiative,¹⁸ it should cover: the definition of media "controller"; the limitation

¹⁸

of certain cases of cumulative control over various media companies simultaneously by a single person; the use, to this end, of the criteria of the distribution area covered and the actual media audience served by a single media controller; the question of persons who are excluded from becoming a media controller ("disqualified persons"); the transparency and exchange of information on media control; and the cases in which there is a change of media controller.

(b) The criterion of the actual audience

As indicated in the Green Paper, it is logical to apply the criterion of the actual audience since, it being a question of the pluralism of the media, it is necessary to assess the effects of the concentration of media control on the "citizen consumer". Compared with the criterion of the number of channels that can be controlled by a single person, the criterion of the actual audience has the advantage of being more suited to the new environment of information technologies and the information society, which will lead to a multiplicity of channels. It would also be economically more sensitive and less harsh (the creation of a bundle of specialized channels would be facilitated, whereas the criterion of the number of channels could prevent this) and more effective as regards preserving pluralism (depending on its actual audience, a single channel can frustrate pluralism). Compared with market share, the actual audience has the advantage that it does not duplicate the efforts of competition law, which uses this criterion to assess the behaviour of economic operators among themselves (taking account, in particular, of earnings) and not to evaluate as such the impact of media control on the "citizen consumer". The criterion of the actual audience raises a number of questions, however, which have prompted the Commission to launch a feasibility study. This examines, in particular, the comparability and compatibility of the different national systems of audience measurement, the types of audience measurement that can be used and the possibility of using a single composite criterion or of combining several types of measurement depending on the configuration of the media in question.

(c) The criterion of the media controller

The task here will be to find a definition which makes it possible, when a new channel is launched by an operator (or when he acquires control of an existing channel), to determine what media are already controlled by the operator and broadcast or distributed over the same area as that of the new channel. Once the various media have been inventoried, it will be possible to determine the total actual audience controlled by a single operator.

The advantage of determining who controls what media is that it will then be possible to provide, at one and the same time, the legal certainty necessary for investment, sufficient effectiveness for avoiding circumvention and a high level of feasibility resulting in easy implementation, and to take account of new equilibria between the players resulting

from the new technologies. The Commission has also initiated a study on this subject, to find a definition of "controller" which will reflect experience at national level and will dovetail with the various definitions of control already used in competition law and company law.

The issue of "disqualified" persons. In defining control, it will also be necessary to determine, as is done in certain national laws, the categories of person who cannot become a media controller on account of their duties or activities.

(d) Other questions

Other questions will have to be examined, such as the legal form which the initiative should take, the question of the coverage of monomedia press concentration, the question of the need for an independent committee and the matters raised by the evolution of the new technologies, such as the definition of the new media and the link with the problems of access.

(e) Consultations on these questions

The Commission is aware of the need to examine more thoroughly certain questions concerning content before the initiative is presented. In the months ahead, specific consultations on these matters will be held with the interests concerned (in particular those who have already taken part in the consultations on the need for action). The analysis of the results of the two studies referred to above will be distributed in addition to a questionnaire on the method envisaged for regulating access to ownership. The Commission is keen to maintain close contact with Parliament and the national authorities throughout this process. The competent national authorities will be requested to provide contributions to the debate.

3. DEVELOPMENT OF THE NETWORK OF INTERESTS CONCERNED IN MEDIA OWNERSHIP

The Commission is particularly anxious to maintain and develop the links which were forged with MEPs and the interests concerned during the consultation process. The value of the network which emerged comes partly from its composition - MEPs, industry associations and individual operators - and partly from its multisectoral nature, comprising as it does operators with activities in radio, television, the press and multimedia. These different sectors are not always in the habit of comparing their interests, which are increasingly common however, as soon as the subject of who owns the media is broached. This flexible and informal structure should be developed, in particular to include certain Member States whose operators have not been much in evidence hitherto.

The network, which deserves to be upgraded, could prefigure, in the medium term, a more multisectoral structure comprising all services using information highways. The Commission is encouraging industry circles to organize themselves accordingly, so as to promote the expansion of information society services.

C. Timetable

The consultations will be launched in the autumn with a view to receiving the observations from all interested parties during the winter of 1994/95. The consultations will start with the distribution of the results of the studies and a questionnaire. It will be in the light of these consultations that a potential initiative could be presented during 1995.

LIST OF NON CONFIDENTIAL WRITTEN COMMENTS

I Comments on the Green Paper

- Comments from European federations or associations

Association des Télévision Commerciales Européennes (ACT)
European Association of Advertising Agencies (EAAA)
Association Européenne des Radios (AER)
European Advertising Tripartite (EAT)
European Committee of Trade Unions in Arts, Mass Media and Entertainment (EGAKU)
European Publishers Council (EPC)
Fédération Européenne des Radios Libres (FERL)
European Group of the International Federation of Journalists (IFJ)
World Federation of Advertisers (WFA)
Comité des Industries Cinématographiques et audiovisuelles des Communautés Européennes et de l'Europe extracommunautaire (CICCE)
European Broadcasting Union/Union Européenne de Radio-Télévision (EBU/UER)
AMARC-EUROPE
European Newspaper Publishers' Association (ENPA-CAEJ)
Europäische Grafische Föderation

Comments from interested parties other than European federations or associations

Broadcasting Entertainment Cinematograph & Theatre Union (BECTU)
Channel Four Television
Europäisches Medieninstitut
Editoriale l'Espresso
ITV
Institute for Information Law (IVIR)
New International plc.
Pearson plc.
Zweites Deutsches Fernsehen (ZDF)/Arbeitsgemeinschaft der öffentlichrechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD)
Independent Television Commission (ITC)
Fininvest Comunicazioni
British Sky Broadcasting Limited (BSkyB)
Verband Privater Rundfunk und Telekommunikation e. V. (VPRT)
Federazione Italiana Editori Giornali
RTL plus Deutschland Fernsehen
Federazione Radio Televisioni (FRT)
Reuters
RCS Editori "Rizzoli Corriere della Serza"
Bundesverband Deutscher Zeitungsverleger e. V.

II Replies to the complementary questionnaire

- Comments from European federations or associations

Association des Télévisions Commerciales Européenes (ACT)
Association Européenne des Radios (AER)
European Broadcasting Union/union Européenne de Radio-Télévision (EBU/UER)
Fédération Graphique Européenne (EGF)
European Group of Television Advertising (EGTA)
Association Européenne des Editeurs de Journaux (ENPA)
European Publishers Council (EPC)
Fédération des Associations d'Editeurs de Périodiques de la CE (FAEP)
Fédérations des Editeurs européens/Federation of European Publishers (FEE/FEP)
Groupement européen des Sociétés d'Auteurs et Compositeurs (GESAC)
International Federation of Journalists (IFJ)

- Comments from interested parties other than European federations or associations

Bertelsmann AG
Channel Four Television
Fininvest Comunicazioni
Federazione Italiana Editori Giornali
FUNK Fragen Unabhängiger Neutraler Kommunikation
Global Media Italia SRL
ITC Independent Television Commission
ITV Network
L'Espresso
News International
OLON Organisatie van Lokale Omroepen in Nederland
Person plc
RCS Editori
RTL Plus Deutschland Fernsehen
VDZ Verband Deutscher Zeitschriftenverleger e.V.
Zweites Deutsches Fernsehen (ZDF)

INVITATION LIST FOR HEARING

Association des Télévisions commerciales (ACT)
Association européenne des Radios commerciales (AER)
Association internationale des Télédistributeurs (AID)
Association Mondiale des Radiodiffuseurs Communautaires (AMARC + AMARC-EUROPE)
Bureau européen des Unions des Consommateurs (BEUC)
Confédération des Associations d'Editeurs de Journaux (CAEJ)
Coordination européenne des Producteurs indépendants (CEPI)
Confédération européenne des Syndicats (CES/ETUC)
Comité des Industries cinématographiques des Communautés européennes (CICCE)
European Association of Advertising Agencies (EAAA)
European Alliance of Press Agencies (EAPA) (Belga Direction)
Europäischer Gewerkschaftsausschuß für Kunst, Medien und Unterhaltung/Secretariado
Internacional de los Sindicatos de Artes, Medios de Comunicación y Espectáculo
(EGAKU/SETU)
European Advertising Tripartite (EAT)
European Films Producer Association (EFPA)
European Group of Television Advertising (EGTA)
European Graphical Federation (EGF/FGF)
European PUBLisher Council (EPC)
European Programmes Providers Group (EPPG)
Fédération des Associations des Editeurs de Périodiques (FAEP)
Fédération des Editeurs européens (FEP/FEE)
Fédération européenne des Réalisateurs de l'Audiovisuel (FERA)
Fédération européenne des Radios Libres (FERL)
Fédération européenne des Téléspectateurs (FET/LA TELE EST A NOUS)
Fédération Internationale des Artistes (FIA)
Fédération Internationale des Associations de Distributeurs (FIAD)
Fédération Internationale des Associations de Producteurs de Films (FIAPF)
Fédération Internationale des Journalistes (FIJ)
Fédération Internationale de Musiciens (FIM)
Fédération Internationale des Producteurs de Film Indépendant (FIPFI)
Fédération Internationale des Syndicats des Travailleurs de l'Audiovisuel (FISTAV)
Groupement des Sociétés d'Auteurs et Compositeurs (GESAC)
Fédération Internationale des Producteurs de Phonographes (IFPI)

Union européenne de Radiodiffusion (UER/EBU)

Union des Confédérations de l'Industrie et des Employeurs d'Europe (UNICE)

World Federation of Advertisers (WFA)

The EC Committee

Eureka Audiovisual

Conseil de l'Europe

Conseil de Ministres

Parlement européen

Comité Economique et Social (CES)

European Free Trade Association (EFTA)

UNESCO

Etat membres

S U M M A R Y

The purpose of the Green Paper is to present an initial assessment of the need for Community action concerning concentration in the media (Television, radio, press) together with the different approaches which the Commission might adopt once it has consulted the parties concerned.

In recent years, Parliament has expressed its concern about this question on several occasions, in particular in its resolutions of 15 February 1990 and 16 September 1992, which call on the Commission to propose regulatory measures so as to restrict concentration in the media and safeguard pluralism.

In the light of the Community's objectives and powers, the results of this look into the need for action can be summarized as follows:

1. Protection of pluralism as such is primarily a matter for the Member States. In working towards its objectives and exercising its powers, the Community must, however, ensure that its own activities and those for which it has competence do not adversely affect pluralism. In this respect with regard solely to the objective of safeguarding pluralism, there would not appear to be any need for action at Community level, since national mechanisms for protecting pluralism can be applied to situations with a Community dimension. Thus, should a broadcaster established in another Member State genuinely circumvent legislation on pluralism, the Member State of reception could, subject to observing the conditions laid down in the case law of the Court of Justice, restrict the free movement of such broadcasts. Similarly, where a merger declared to be compatible with the common market under the Merger Control Regulation is harmful to pluralism, the Member State would still be able to take appropriate measures to ensure that pluralism is protected.

2. This capacity of the Member States to safeguard pluralism through a national regulatory framework for mergers may, however, lead to interference within the area without frontiers consisting of the Community. Since the mid-1980s, laws on media ownership have been introduced and are developing in divergent ways. Such laws on pluralism, which consist in particular in limiting maximum holdings in media companies and in preventing cumulative control of, or holdings in, several media companies at once, must be distinguished from the discriminatory restrictions which limit ownership by foreigners and which are therefore incompatible with the Treaty.

3. Disparities between national measures aiming to safeguard pluralism may, at least potentially, impact upon the functioning of this area without frontiers :

- a Member State could possibly restrict the free movement of broadcasts in the event of genuine circumvention of one of these laws;
- the establishment of media companies in another Member State could be limited;
- restrictions and distortions of competition are introduced;
- uncertainty in the law, harmful to the competitiveness of companies, could result from diverging views on what constitutes circumvention;
- such laws limit access to the activities and to the ownership of the media, when access should be facilitated so as to permit the establishment of the single market and secure the competitiveness of media companies which pluralism requires.

4. The restrictions on ownership at the root of these effects are not, as such, incompatible with Community law. They are not discriminatory and pursue a public-interest objective associated with freedom of expression.

5. Restrictions on media ownership cannot be replaced just by applying general competition law and in particular, at Community level, the Merger Control Regulation. The latter can prevent mergers which adversely affect pluralism only in so far as they also affect competition, which is not always the case.

6. In the light of this analysis, there are three different options among which the Commission may choose and on which the Commission would like to know the opinions of the parties concerned:

- (I) taking no action;
- (II) proposing a recommendation to enhance transparency;
- (III) proposing the harmonization of national restrictions on media ownership by
 - (a) a Council Directive, or
 - (b) a Council regulation, or
 - (c) a directive or a regulation together with an independent committee.

The Commission does not currently have a particular preference for, any one of these options and leaves open the possibility for other eventual alternatives. It wishes to know the views of interested parties on these options as well as on the questions posed in this Green paper which are summarised below:

QUESTION 1

The Commission would welcome the views of interested parties regarding the needs for action, and in particular on:

- any cases where the Community dimension of media activity has meant that restrictions on media ownership imposed for the purpose of maintaining pluralism have become ineffective, for example because they are circumvented or because of transparency problems;*
- the existence of restrictions or restrictive effects other than those identified above;*
- practical instances where ownership restrictions have actually impeded the activity of economic operators in the sector;*

- the sectors and activities which are especially affected by restrictions on ownership (for example, is the press subject to restrictive effects not only in respect of multimedia aspects but also in respect of monomedia aspects?).

QUESTION 2

The Commission would welcome the views of interested parties on whether the needs identified are of sufficient importance, in the light of Community objectives, to require action in the media industry and, if so, when such action should be taken.

QUESTION 3

The Commission would welcome the views of interested parties on the effectiveness, in the light of Community objectives, of action which would be taken solely at Member State level.

QUESTION 4

The Commission would welcome the views of interested parties on the content of a possible harmonization instrument as envisaged above, and in particular on the two variants for its scope, on the use of the real audience as a basis for setting thresholds, on the demarcation of distribution areas, on any other possible references, and on ways of defining the concept of controller.

QUESTION 5

The Commission would welcome the views of interested parties on the desirability of action to promote transparency which would be separate from a harmonization instrument.

QUESTION 6

The Commission would welcome the views of interested parties on the desirability of setting up a body with competence for media concentration.

QUESTION 7

The Commission would welcome the views of interested parties on each of these foreseeable options.

10. Pluralism and media concentration

A3-0435/93

Resolution on the Commission Green Paper 'Pluralism and media concentration in the internal market'

The European Parliament,

- having regard to the Commission Green Paper 'Pluralism and media concentration in the internal market' (COM(92)0480 — C3-0035/93),
 - having regard to Rule 51 of its Rules of Procedure,
 - having regard to the report of the Committee on Culture, Youth, Education and the Media and the opinions of the Committee on Legal Affairs and Citizens' Rights and the Committee on Economic and Monetary Affairs and Industrial Policy (A3-0435/93),
- A. having regard to its resolutions of 15 February 1990 on media takeovers and mergers ⁽¹⁾ and 16 September 1992 on media concentration and diversity of opinions ⁽²⁾, in which it drew attention to the dangers of media concentration for diversity of opinion and pluralism and expressed the view that national media legislation alone was no longer sufficient to safeguard diversity of opinion and pluralism in Europe,
- B. welcoming the fact that the Commission has considered the problem, presented its Green Paper 'Pluralism and media concentration in the internal market' and, in advance of Community measures, has already initiated a comprehensive consultation process with the parties concerned,
- C. whereas media concentration and cross-ownership are increasing in the Community; whereas, once established, such cross-ownership, where it reduces diversity of opinion, is difficult to reverse,
- D. convinced that legislation should therefore be adopted without delay to enable the Community, where necessary, to take measures to limit media concentration on a European scale which threatens diversity of opinion and pluralism,
- E. whereas there is a need to harmonize national legislation which imposes restrictions on the media in order firstly to prevent them being evaded and secondly to safeguard the operation of the internal market, thereby at the same time increasing the competitiveness of the European media,
- F. having regard to the important contribution made by public broadcasting to promoting diversity of opinion, pluralism and general education; whereas such broadcasting is subject to different market conditions from commercial broadcasting,
- G. whereas the market share of public non-commercial broadcasting in some Member States has been declining sharply since the advent of commercial broadcasting,

⁽¹⁾ OJ C 68, 19.3.1990, p. 137.

⁽²⁾ OJ C 284, 2.11.1992, p. 44.

Thursday, 20 January 1994

- H. whereas the change towards multi-media is coming fast as a result of technological developments; whereas a Directive is needed to take account of its impact on the mass media,
- I. whereas the Community should accede to the European Convention on Human Rights and Fundamental Freedoms and thereby take on the obligation to protect freedom of expression and the diversity deriving therefrom and should contribute to further development of that right, *inter alia* in relation to countries with which it has concluded association or other agreements,
- J. noting that the world market for media (TV, radio, written material) is huge, that today the EC has the largest individual share of it, and that this sector has great employment potential for the future,
- K. whereas the internal market for the media sector can provide more profits, jobs and cultural diversity, and hence lead to a greater readiness to invest, more training places and more research and development activity in the sector,
- L. bearing in mind that legislation on media concentration must take into account not only the economic dimension but also, and to an equal degree, the cultural dimension, and that strengthening the overall competitiveness of European media must be accompanied by strengthening of economic and cultural pluralism in this sector,
- M. aware that the control of a large audience share within a particular area by one individual or company poses a danger to pluralism, cultural diversity and the quality of the media, by lessening media autonomy and independence,
- N. whereas pluralism in the media is an essential element in the construction of the European Union in accordance with the requirements of democracy and respect for human rights laid down by Article F of the Treaty on European Union,
- O. whereas the disparities between Member States' legislation on pluralism and concentration may represent an obstacle to the operation of the internal market, particularly as regards the freedom to provide services and freedom of establishment,
 - 1. Calls on the Commission to submit a proposal for a Directive firstly harmonizing national restrictions on media concentration and secondly enabling the Community to intervene in the event of concentration which endangers pluralism on a European scale; in doing so the Commission should consult the parties concerned in accordance with Option III, Sub-option c, as referred to in the Green Paper (Directive or Regulation in conjunction with an independent committee); the following criteria should apply:
 - (a) it should cover the entire media sector, i.e. the print media as well as the audiovisual media; only in this way can multimedia concentration (cross-ownership) be assessed more effectively and, if necessary, limited,
 - (b) it must not be based on the issue of formal ownership alone: it must be possible to investigate whether a 'dominant influence' exists for other reasons (e.g. sleeping partners, alliances, dependence on one programme supplier or one advertiser),
 - (c) certain groups/companies should be excluded from participation in particular media sectors (disqualified persons): for example, advertising agencies should not be allowed to run newspapers or radio or television companies and vice versa,
 - (d) syndicates for the purchase of advertising space should likewise be subject to stringent national and Community provisions governing competition, to ensure that they cannot influence the editorial lines of the various media either directly or indirectly; the linking of advertising and programming (barter) should be restricted,
 - (e) links involving programme suppliers, including holders of programme rights and programme producers, on the one hand, and broadcasters on the other hand, should be subject to a strict application of the law on competition,

Thursday, 20 January 1994

- (f) the principle of absolute transparency of ownership should apply; radio and television broadcasters should be compelled to reveal full details of ownership and trusteeships and any other relevant economic data (by analogy with cartel law); changes in ownership should be reported. Independent experts appointed by the supervisory authorities for the media and required to maintain confidentiality must be allowed to inspect the relevant documents, including tax documents, upon request; refusal to disclose such information on the grounds that it is confidential for commercial reasons should be prohibited,
 - (g) in so far as, by virtue of effective safeguards provided by national legislation, a broadcasting organization is structured independently and in such a manner as to ensure internal diversity, and operates on a non-profit-making basis, it should be exempted from the provisions of the Directive except those on transparency,
 - (h) in accordance with the subsidiarity principle, any Community action must allow the Member States sufficient scope to meet the particular requirements of the media in their country. This applies above all to the organizational structure of the media, programming rules and positive measures including those to promote non-commercial radio stations or independent newspapers,
 - (i) it must be possible, *inter alia* for Member States, to respond to new and currently unforeseeable threats to diversity of opinion, for example if telephone companies offer to distribute programmes,
 - (j) the independent committee or European Media Council should have a purely advisory function: with the support of the national institutions responsible for the media, the following tasks and powers should be entrusted to it:
 - observing developments in the media both in Europe and elsewhere, including technical/economic and social trends; submitting a report on the media every two years,
 - ensuring complete transparency with regard to cross-ownership (disclosure of all private and public share-holdings),
 - submitting to the Commission reports and opinions on planned mergers between enterprises on a Community or European scale,
 - making proposals to the Commission concerning possible deconcentration measures;
2. Takes the view that the proportion of media consumers reached by a particular media proprietor (controller) is an appropriate additional criterion for assessing the degree of concentration in the media;
3. Takes the view that the quality and diversity of this sector (how this industry develops and the information it seeks to provide) is at the very heart of democracy;
4. Expects the harmonization of national provisions restricting media concentration to afford a high level of protection to pluralism and diversity of opinion and expects that, at the same time, access to the market for new media enterprises will be eased;
5. Calls on the Community and Member States to do their utmost to ensure that the EC Directive is subsequently complemented by a Council of Europe Convention in order to take into account the pan-European dimension of media concentration;
6. Calls on the Commission once again to present proposals concerning the catalogue of measures set out in the European Parliament's resolution of 16 September 1992 and propose an action programme to promote pluralism and diversity of opinion, including, in particular:
- a proposal for a Directive on the right of access to information from Community and national authorities, along the lines of the US Freedom of Information Act,
 - a European media code to maintain professional ethics, which should ideally be drawn up by the parties concerned,
 - a framework Directive safeguarding journalistic and editorial independence in all media;
7. Instructs its President to forward this resolution to the Commission and the Council.
-

— provide for possible consultation before the Commission finalizes its decision, and

— lay down criteria for consideration of the Committee's proposals by the Commission and the Council.

Done at Brussels, 22 September 1993.

The Chairman
of the Economic and Social Committee
Susanne TIEMANN

Opinion on the Commission Green Paper on pluralism and media concentration in the internal market - an assessment of the need for Community action

(93/C 304/07)

On 15 February 1993, the Commission decided to consult the Economic and Social Committee, under Article 198 of the Treaty establishing the European Economic Community, on the Commission Green Paper on pluralism and media concentration in the internal market - an assessment of the need for Community action.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 7 July 1993. The Rapporteur was Mr Flum.

At its 308th Plenary Session (meeting of 22 September 1993) the Economic and Social Committee adopted the following Opinion by a majority with seven votes against and 15 abstentions.

The Committee welcomes the publication of the Green Paper, and particularly appreciates the comprehensive picture it provides of the existing legal situation in the Member States.

The Committee also welcomes the form taken by the Green Paper which, instead of making precipitate statements, paves the way for extensive dialogue between the various groups in society.

1. Introduction

1.1. The ESC has played a constructive part in the formulation of Community options for the electronic media during and since the preparation of the Council Directive of 3 October 1989⁽¹⁾ on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (the tele-

vision without frontiers Directive). It made a direct contribution to the drafting of that Directive by proposing important elements.

1.2. In view of the discussion in the Green Paper, it seems necessary to restate the basic principles of ESC media policy to date. Thus, in its Opinion of 25 September 1985⁽²⁾ on the Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable⁽³⁾, the Committee stated that it was not the task of the Community to interfere with the media structure of individual Member States. The licensing of television and radio organizations should remain the sole responsibility of the Member State concerned, although care had to be taken to ensure there was no threat to the pluralism of information and opinions in the Community. In the same Opinion, the Committee called on the Commission to examine to what extent new proposals were needed to align national provisions on programme content in order to ensure uniform terms of competition; in this connection, it made particular reference to the following areas:

⁽¹⁾ OJ No L 298, 10. 1989.

⁽²⁾ OJ No C 303, 25. 11. 1985, p. 13.

⁽³⁾ Doc. COM(84) 300 final.

protecting minors, right of reply, copyright for authors, performers and producers, television advertising. From the present standpoint, it was also particularly important to examine in greater detail the influence of television advertising and the independence and completeness of information broadcasts and the influence of advertising agencies on the trade in programmes. In its Resolution on media concentration and diversity of opinions of 16 September 1992⁽¹⁾, the European Parliament expressed concern 'at increasing concentration in the advertising business and its substantial influence on programming and media content'; the Commission also intends to investigate the situation with regard to advertising.

1.3. In its Opinion of 1 July 1987⁽²⁾ on the Proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities⁽³⁾ the Committee expressed the view that the national legislative and administrative measures to be taken in broadcasting must steer clear of any arrangements which might tend to create a dominant opinion-former. In its Additional Opinion of 27 April 1989⁽⁴⁾ the Committee again stressed the need to prevent any acts which could promote the creation of a dominant position and thereby restrict pluralism and freedom of information. The Committee is extremely encouraged to note that the television Directive adopted by the Council contains a section regulating the right of reply of all natural and legal persons whose lawful interests are damaged by false statements on television. The Economic and Social Committee was the first Community body to demand this right in the course of the drafting process, being subsequently followed by Parliament, the Commission and the Council. Full account has also been taken of the Committee's comments on copyright, the protection of children and minors and advertising, with the latter being banned in the case of tobacco products and prescription drugs for medical treatment.

1.4. In its Opinion of 20 December 1989⁽⁵⁾ on a fresh boost for culture in the European Community⁽⁶⁾, the Committee noted that the development of huge European media corporations was hallmarked by globalization, interlinking and the establishment of conglomerates. Appropriate anti-trust measures were therefore needed. The Committee urged the Commission to consider setting down more clearly the limits to cross-holdings and media monopolization, notably through measures requiring transparency of financial transactions and the full disclosure of international holdings.

(1) OJ No C 284, 2. 11. 1992, p. 44.
 (2) OJ No C 232, 31. 8. 1987, p. 29.
 (3) OJ No C 179, 17. 7. 1986, p. 4.
 (4) OJ No C 159, 26. 6. 1989, p. 67.
 (5) OJ No C 62, 12. 3. 1990, p. 26.
 (6) OJ No C 175, 4. 7. 1988.

It also proposed the creation of a European Media Observatory in order to monitor and, where appropriate, curb such economic concentrations, and to help promote and ensure freedom of information and cultural pluralism.

1.5. The Committee also called for back-up EC measures to guarantee minimum protection for professional standards, ethics, editorial autonomy and freedom of conscience for all media journalists and employees. Likewise, EC instruments were needed in order to ensure basic collective contractual rights and social insurance cover for employees involved in the media, and to ensure that transnational corporations respected acquired rights and international labour conventions.

1.6. Lastly, in its Opinion of 20 September 1990⁽⁷⁾ on the Commission Communication to the Council accompanied by two proposals for Council Decisions relating to an action programme to promote the development of the European audiovisual industry — 'Media' 1991-1995⁽⁸⁾, the Committee adopted the following stance: 'Different kinds of programme-makers with varying legal status, i.e. both public- and private-sector suppliers, can coexist in democratic and socially responsible ways, thereby laying the foundation for cultural pluralism. However, it must be ensured that all such entities of whatever kind respect the principle of free expression of opinion for all social groups. All available means must be used to combat the development of monopoly-type structures in the record, cassette and film distribution business which hinder or even prevent free trade in these media articles'.

1.7. In parallel to the Committee's own observations, the European Parliament's Resolution A3-0153/92 corr. on media concentration and diversity of opinions of 16 September 1992 makes important proposals on the need for Community action. In particular, the Committee would endorse the calls for:

- the drafting of a charter for European non-profit-making broadcasting organizations, i.e. public broadcasting organizations, broadcasting cooperatives and public-access channels;
- the protection and safeguarding of Europe's cultural heritage and cultural output;
- the regulation of short reporting on events of general interest, with a corresponding right of news access;
- the formulation of a Media Code designed to maintain professional ethics (see Point 5);

(7) OJ No C 332, 31. 12. 1990, p. 174.
 (8) OJ No C 127, 23. 5. 1990, p. 13.

- a Commission proposal for a European framework Directive safeguarding journalistic and editorial independence in all media;
- a proposal for effective measures to combat or restrict concentration in the media; and
- the establishment of an independent European Media Council.

2. Gist of the Commission Green Paper

2.1. In the light of the basic approach adopted in the EEC Treaty and, consequently, in the Green Paper, the Commission's concentration on the creation of a smoothly functioning internal market for radio and television is understandable. Nevertheless, in view of the fact that the audiovisual media and the information policy associated with their use constitute important bases for Europe's social and democratic development, the Committee thinks that the safeguarding of pluralism and of the freedom and variety of the opinions expressed in those media should receive at least the same degree of attention. Moreover, no account is taken of the role of the press in this context—either as a corrective or stimulant to concentration processes in the audiovisual sector. As long as media-policy decisions—at either national or Community level—entail the risk of the creation of opinion-forming cartels, European development could be threatened. The Committee would stress the importance of safeguarding basic rights in the Community as the Community organs, especially the Court of Justice, have repeatedly recognized.

2.2. The Green Paper makes specific reference to European Parliament Resolutions and to the work of the Council of Europe. However, the Committee, too, has already adopted a stance on the problem of concentration in the media, particularly in its Opinions on television without frontiers. The failure to take note of ESC comments on this subject is a fundamental shortcoming of the Green Paper; the final version of the Commission document should take account of the Committee's extensive preparatory work, proposals and ideas on this topic.

2.3. The Commission's purpose in publishing the Green Paper is to present an initial assessment of the need for Community action on concentration in the media (television, radio, press) and of various approaches which the Commission might adopt once it has ascertained the views of the parties concerned.

2.4. On the basis of its analysis of the different national regulations and measures governing pluralism and media concentration, the Commission has reached the following conclusions:

2.4.1. Protection of pluralism as such is primarily a matter for the Member States. In working towards its objectives and exercising its powers, the Community must, however, ensure that pluralism is not adversely

affected by its activities and the way it exercise its powers. In this respect, the Commission sees no need for special action at Community level to safeguard pluralism, since national arrangements for protecting pluralism can, in principle, also be applied to situations with a Community dimension.

2.4.2. This capacity of the Member States to safeguard pluralism through a national regulatory framework for mergers may, however, lead to discrepancies within the frontier-free area constituted by the Community. This is particularly true in the case of national provisions which are designed either to limit maximum holdings in media companies or to prevent control of, or holdings in, several media companies.

2.4.3. Such national regulations may, at least potentially, impact upon the functioning of the frontier-free single market:

- a Member State could possibly restrict the freedom to broadcast of radio stations in the event of genuine circumvention of one of these laws,
- the establishment of media companies in another Member State could be limited,
- restrictions and distortions of competition could be introduced,
- uncertainty as to the law, harmful to the competitiveness of companies, could result from diverging views on what constitutes 'circumvention',
- such legal provisions limit access to the activities and to the ownership of the media, instead of facilitating access so as to permit the establishment of a single market and give media companies that competitiveness which pluralism requires.

2.4.4. Ownership restrictions causing such effects are not necessarily incompatible with Community law because they help to guarantee or safeguard pluralism. Consequently, they cannot be replaced just by applying general competition law and in particular, at Community level, the merger control regulation.

2.4.5. The Commission proposes the three following options for possible Community action:

- I. Doing nothing
- II. Proposing a recommendation to enhance transparency;
- III. Proposing the harmonization of national restrictions on media ownership by
 - a) a Council Directive, or

- b) a Council Regulation, or
- c) a directive or a regulation together with an independent committee.

The Commission does not currently have a particular preference for any one of these options and remains open to alternative suggestions.

3. General comments

3.1. The Committee thinks that the Commission should take account of the following points in the course of further discussion:

- a) The Green Paper's analysis of the situation in the Member States concludes that the existence of disparate anti-trust provisions in respect of the media impedes the operation of the single market in this sector and that Community action is therefore necessary. The Committee recognizes that the obstacles to the operation of the single market created by different national provisions (restriction/distortion of competition, limitation of the freedom to provide services and the right of establishment, legal uncertainty) must be removed so as to enable enterprises to enjoy both the benefits of the single market and equal opportunities for development within the EC. But the Commission sees no need for Community legislation to safeguard pluralism and the freedom of opinion since, on the one hand, the EC Treaty makes the Member States responsible for ensuring pluralism and, on the other, the different national rules on this subject ostensibly provide adequate guarantees.
- b) For the Committee, this conclusion represents an oversimplification. The Commission itself acknowledges that, whilst EC competition law can help in maintaining pluralism, it is not the appropriate instrument for this task. Moreover, the mere removal of legal restrictions during the approval procedure for broadcasters could reduce pluralism. The safeguarding of pluralism and freedom of opinion in programmes essentially depends on rules designed to prevent media concentration processes which could lead to monopoly-type mergers. The more certain large media extend their dominance over European countries, the fewer the opportunities for smaller suppliers to maintain alternative programme production.
- c) Even if the Community's power is limited to the establishment of the internal market, there can be no doubt that, in the case of the media, such market mechanisms have a major influence on the safeguarding of pluralism in the supply of programmes—and, consequently, the freedom and variety of opinions. The Committee therefore feels it would be wrong for the Community to avoid taking action to maintain pluralism. Such action should, accordingly, define the limits to media concentration so as to protect pluralism in the EC against media companies which dominate entire sectors of opinion-forming activity in certain regions. Whilst the economic health and competitiveness of businesses may be preconditions for pluralism, they do not automatically increase it and may even lead to a reduction if the market is controlled by a single company.
- d) Rules on national and trans-national media companies which achieve monopoly-type dominance of broad sectors in certain countries are considered by the Committee to be necessary; the EC Directive cannot concentrate exclusively on the removal of barriers to market access—Community legislation must also set precise limits to media-specific concentration. The same applies to State-run television and radio organizations which dominate the market by virtue of the size. On the other hand, public broadcasting companies, whose independence from government interference is guaranteed by the public bodies controlling them, can significantly help to safeguard the freedom of opinion and information and thus to ensure pluralism.
- e) It is necessary to introduce legislation governing access to satellite frequencies which allow unrestricted broadcasting to Europe.
- f) A media committee made up of members of the European Parliament and the ESC and including independent experts and representatives of interested social groupings should be set up to advise the Commission.
- g) The Committee thinks that pluralism should also be safeguarded by legal provisions in other areas. Requirements must therefore be laid down in respect of minimum democratic standards in European television and radio stations and the press (safeguarding of 'internal' broadcasting and press freedom through cooperation, participation and the prohibition of censures). Thus, in its Milan Declaration of 5 March 1993, the European Group of the International Federation of Journalists (IFJ) stated: 'But apart from measures aimed at safeguarding pluralism in the media in general, there is a need for securing pluralism inside the publishing houses and broadcasting stations. There is the need to secure editorial independence. The editorial staff detains (sic) the moral and intellectual capital of publishing houses and broadcasting stations'. The Milan Declaration also sets out minimum standards of editorial independence for all European media.

3.2. The Committee therefore urges the Commission to take steps to ensure that ownership conditions in the press and electronic media sector are made completely public by requiring transparency in financial transactions and full disclosure of worldwide company holdings, cross-holdings and concealed third-party holdings. Such transparency must be compelled by specific Community legislative provisions as a precondition of legal protection for freedom of opinion and information.

3.3. In view of the importance of the media for a democratic, pluralistic social order in the Community, it is not sufficient to monitor concentration processes and take action to prevent any adverse consequences for freedom of information and cultural diversity. Consideration should therefore be given to the creation of a European Media Council as a self-regulatory body for the sector, which could deal with such developments and suggestions for improving European media policy.

3.4. The ESC would point to the pre-eminent importance attaching to Community regulations, while paying due regard to the subsidiarity principle. It is, however, essential that—in view of the technological possibilities (satellite broadcasting)—the Community's basic media rules should also be applied in non-member countries. The Commission should initiate negotiations on such cooperation without delay.

4. ESC answers to the Commission's questions

4.1. Question 1

How great is the need for action, in particular with regard to:

- restrictions on ownership;
- restrictive effects;
- specific restrictions in respect of multi-media and mono-media aspects?

There are sufficient well-known cases which establish the need for action. Legal provisions governing approval conditions have not always been adequately observed; thus, the simultaneous ownership of television stations, TV and radio weeklies and newspapers—which is prohibited in the US, for example—has been exploited by media enterprises to attack or marginalize rival programme producers and gain competitive advantages. The trade in exclusive rights to information is expanding and could ultimately pose a threat to freedom of information. There is also a need to prevent restrictions on pluralism arising from international agreements with third countries which occupy channels and frequencies that have already been assigned to local and regional TV stations in the Com-

munity, thereby limiting or reducing their scope for broadcasting.

4.2. Question 2

Are the needs identified of sufficient importance, in the light of Community objectives, to require action in the media industry and, if so, when should such action be taken?

'Action in the media sector' that is designed to eliminate 'restrictive effects ... which might affect the implementation of the single market in the media industry' must also take account of the impact of unrestricted market dominance on pluralism and the variety of opinions and provide for specific Community rules covering the transparency of media companies and limiting media concentration. The Committee therefore proposes rapid Community action with the aim of:

- defining standard EC-wide concentration rules for the print and electronic media,
- setting minimum democratic standards to ensure 'internal' broadcasting and press freedom in the interests of safeguarding the variety of opinions and freedom of information. The right to report on cultural and sporting events (even of a commercial nature) must also be guaranteed—and must preclude unjustified interference by commercial interests;
- making public the advertising revenue of all broadcasters.

4.3. Question 3

How effective, in the light of Community objectives, would action taken solely at Member State level be?

Whilst national measures may be appropriate, Community action is essential to prevent further media concentration and safeguard pluralism.

4.4. Question 4

What are the views of interested parties on the content of a possible harmonization instrument as envisaged above, and in particular on the two variants for its scope, on the use of the real audience as a basis for setting thresholds, on the demarcation of distribution areas, on any other possible references, and on ways of defining the concept of controller?

4.4.1. As regards the scope of the Green Paper (Chapter V, 1, C), the Committee agrees that restrictions deriving from pluralism rules cannot relate to programme content. Whilst provisions designed to ensure variety of opinions and freedom of information

in broadcasting are indispensable, their codification and monitoring must continue to be regulated nationally. Yet, even if their partial effectiveness were established, there would be no guarantee of genuine pluralism since the lifting of national restrictions on media ownership in the internal market would favour further expansion by international media corporations whose interests and programme policies are not guided by pluralist ideals. There is now sufficient evidence to show that, far from increasing pluralism, commercially-orientated broadcasting policy simply leads to more of the same, i.e. merely the plural rather than pluralism.

4.4.2. The Committee therefore welcomes the Green Paper's consideration of the balance to be struck between ensuring diversity and facilitating market access when harmonizing national legislation in the internal market and would again stress the need for anti-concentration rules for media enterprises above a certain size.

It would make the following specific proposals:

- In view of the existence of international multi-media corporations, ownership restrictions must also be introduced in respect of the press.
- Neither media nor non-media enterprises must be allowed to dominate the market in several media sectors (television, radio, press) in one or more national markets; similarly, no such enterprise that already controls a national media sector must be allowed to extend its market dominance.
- Media or non-media companies already dominating the market in one national media sector should not be allowed to acquire a majority holding in media companies elsewhere in the Community.
- Before a media company that is already active in one media sector is allowed to operate in another media sector, all its holdings and cross-ownership arrangements must be disclosed in full.

4.5. Question 5

What would be the advantage of action to promote transparency which would be separate from a harmonization instrument?

For the reasons already stated, the Committee sees little point in measures to ensure the transparency of all media companies in the absence of action to control media concentration and pluralism.

4.6. Question 6

How desirable would it be, regardless of the 'procedural' aspects of a possible harmonization instrument, to set up a body with competence for media concentration?

In accordance with the European Parliament's Resolution of 16 September 1992, it seems advisable to set up a European Media Council or media arbitration centre composed of independent experts and representatives of relevant social and cultural interest groups. This would have the task of analyzing concentration processes and advising Parliament and the Commission on all EC media questions.

4.7. Options

I. No specific action:

The Committee shares the views of the European Parliament with regard to media concentration, and also finds the Green Paper's objections to this approach more convincing. Moreover, the policies pursued by supranational media concerns can no longer be adequately influenced by national legislation. The Committee therefore cannot endorse Option I.

II. Action relating to transparency:

The Committee regards such an isolated Commission proposal to the Member States, which would be independent of action to harmonize national restrictions on media holdings, as inadequate (see 4.5) and consequently rejects it.

III. Action to harmonize laws:

Bearing in mind, in particular, the comments on Question 4 concerning the consequences for pluralism, the ESC endorses, in principle, the introduction of legal provisions by means of a directive and thinks that approximation on the basis of a regulation would be comparatively inflexible. Sub-option C, on the other hand, would appear to be both reasonable and effective.

5. Foundations of a media code

5.1. The problems of growing media concentration and the increasing commercialization and violence of many TV programmes, which are becoming apparent in the context of the Green Paper's topic and are not confined to Europe, require more fundamental discussion. All interested parties should therefore consider the establishment of a European media code which, in

addition to the control of media company power, should provide for the analysis of consumer requirements, bearing in mind, in particular, the maintenance and safeguarding of the freedom of information and opinions, the protection of minors against violent and pornographic programmes and their restriction on grounds of human—particularly female—dignity and the prohibition of the glorification of war.

5.2. The Committee has already laid the foundations for such a European media code in earlier Opinions:

'The increase in the range of media now coming on to the market necessitates consumer-policy measures if the consumer is not unwittingly to become the plaything of those who exercise a direct influence on the media and on the information disseminated thereby. Consumer education can help the consumer make responsible use of media services. Consideration should be given to whether consumer organizations might not themselves be able to help directly in this task via their own consumer education programmes.'

(ESC Opinion of 25 September 1985 on the Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable.)

'There is therefore a possible danger that an ever-increasing proportion of so-called popular programmes (feature films, variety programmes, games) will be offered to the public once the common broadcasting market, as advocated by the Green Paper, has been established. Because of the high audience ratings they command, such programmes are particularly profitable from a commercial point of view. The result might well be standardization incompatible with the objectives of the Green Paper rather than a genuine diversification of programmes.' (ibidem 4.4.)

'Hence the case for setting limits to the free play of competition in radio and television broadcasting through the imposition of European-wide quality standards. For the time being, however, existing national quality standards should be retained and supported.' (ibidem 4.5.2.)

'In the field of 'public order' the Community should introduce provisions to harmonize the necessary basic measures in the interests of:

- protecting minors in particular against pornography and the glorification of violence and armed conflict,
- protecting individuals against misrepresentation (right of reply).' (ibidem 5.4.)

'The Committee endorses the provisions with regard to the protection of children and young persons. It considers that the rules of conduct for this purpose should be accompanied and supported by systematic consumer education at national level so that young people constantly exposed to broadcasting may learn to develop a critical awareness of both programmes and advertisements.'

(ESC Opinion of 1 July 1987 on the proposal for a Council Directive on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities -Article 15, 2.25.)

5.3. In October 1989, the Council adopted the Directive on Television without Frontiers, which set out important guidelines. In it, the Council:

- affirmed the importance of broadcasting for the development of culture and the free formation of opinions in conditions safeguarding pluralism and equality of opportunity,
- recognized the need to consolidate the common broad framework of regulation, notably as regards the responsibilities of the broadcaster not to present indecent, violent or racist material; to reserve for European works a majority proportion of their transmission time; to abide by general standards on the duration, presentation, form and insertion of advertisements; to monitor the content and quality of advertising, with particular reference to information, education and consumer protection.

5.4. In its Additional Opinion on 20 December 1989 on a fresh boost for culture in the European Community, the ESC commented on the Convention as follows:

'Culture is seen as a dynamic, evolutive enrichment of daily life. The European Community dimension has and can continue significantly to contribute to this, not in any perceived 'identikit' fashion, but through the harmony upon which diversity thrives, through increased contact, comparison and mixing, and the identification both of different cultural traditions and of common uniting principles, of mutual understanding and the elimination of prejudices between peoples. The European 'cultural model' is not all-exclusive, still less a 'melting pot' but rather a multi-various, multi-ethnic plurality of culture, the sum total of which enriches each individual culture. The European 'cultural model' serves not as a 'fortress' but as an open springboard towards other cultures both throughout the Community and throughout the world.' (1.4.2.)

5.5. The following sections of this Opinion contain a detailed examination of the 'cultural aspects of media policy'. In a further Opinion of 20 September 1990 on an action programme to promote the development of the European audiovisual industry—'Media' 1991-1995, the ESC noted:

'In relation to people media policy has a variety of effects, responsibilities and democratic, social and cultural duties. We are talking not only of a constantly expanding market with turnover measured in thousands of millions and hundreds of thousands of employees, but more importantly about the maintenance and promotion of Europe's historical identity.' (3.7.3.)

'Different kinds of programme makers with varying legal status, i.e. both public and private sector suppliers, can coexist in democratic and socially responsible ways, thereby laying the foundation for cultural pluralism. However, it must be ensured that all such entities of whatever kind respect the principle of free expression of opinion for all social groups.' (3.7.4.)

6. Conclusion

The Commission is asked to consider the foregoing points and proposals with a view to ensuring that human dignity in a free, democratic society is the focal point of future developments in the European media market.

Done at Brussels, 22 September 1993.

The Chairman
of the Economic and Social Committee
Susanne TIEMANN

Annex 6

Disparities between national rules on media ownership

The Green Paper showed that there were considerable disparities between the specific national laws and regulations limiting ownership of the media for reasons relating to pluralism. Such disparities exist at various levels, particularly as regards the *type of restriction* (limits on cumulation of monomedia or multimedia ownership, limits on the maximum stake in a channel, restrictions as regards the type of person controlling the medium), the *scope* of the restrictions on media ownership (some national rules cover monomedia press concentration, others simply monomedia television, while others also cover multimedia ownership), the *degree of constraint* (the number of licences that can be held concurrently and the shareholding thresholds vary), and the *means of applying* the restrictions (e.g. some national rules distinguish between satellite and terrestrial television, general-interest and specialized or news-only television, and national and regional television). The examples below illustrate these disparities but must be interpreted with caution since there may have been recent changes to the legislation and the simplified presentation precludes any nuances or detailed explanation.

Example No 1. *Disparities between the four types of provision relating to media ownership (defined in the introduction)*

	B	DK	D	G	E	F	IRL	I	L	NL	P	UK
Monomedia press restrictions						+		+				
Monomedia TV or radio restrictions	+		+	+	+	+	+	+	+		+	+
Multimedia restrictions	+		+		+	+		+		+	+	+
Maximum shareholding in a TV station			+	+	+	+			+		+	
Disqualified persons	+	+	+					+		+	+	+

Example No 2. *Disparities between the rules limiting an operator's shareholding in a television channel (irrespective of the number of channels already controlled by that operator)*

- In Italy and the United Kingdom there is no limit of this type.
- In Germany and France, a person's maximum shareholding in a television channel must stay below 50%.
- In Spain, Greece and Portugal, an operator's maximum shareholding in a television channel is limited to 25%.

Example No 3. *Disparities between the rules limiting the number of television channels which may be held by a single person*

- In the United Kingdom, there is no limit in the case of satellite channels.
- In Italy, the maximum number is three channels.
- In Germany, France (satellite channels) and the United Kingdom (Channel 3), the maximum number is two channels.
- In Spain and France (terrestrial channels), the maximum number is one channel.

Example No 4. *Disparities between the rules limiting monomedia press concentration (acquisition of control of one press enterprise by another)*

- In France and Italy, the merger of two press enterprises is prohibited if their newspaper circulation exceeds a certain threshold (France: 30%; Italy: 20%).

In the United Kingdom and Germany, there are no such specific thresholds. There are only thresholds which trigger an obligation to notify and an examination by the competition authorities.

- In the other Member States, there is no specific limit.

Example No 5. *Disparities between the specific rules limiting multimedia concentration by preventing the control of a television channel by a press enterprise*

- Some rules prohibit a press enterprise from controlling a television channel if the newspaper circulation or market share exceeds a certain threshold. The threshold varies according to the Member State: Netherlands 25%, Italy 16%, France 20% (only applies if the newspaper proprietor already controls a radio station or cable network).
- In the United Kingdom, irrespective of the circulation threshold, a newspaper proprietor may only hold 20% of the shares in Channel 3 or Channel 5.
- In the United Kingdom, in the case of satellite channels, there is no limit, nor in France if the newspaper owner does not own a radio station or a cable network.

Example No 6. *Disparities between the rules relating to disqualified persons (the impossibility for certain categories of person, body or enterprise to control a television channel)*

- government, public enterprises and local authorities: B, D, I, NL, P, UK;
- political bodies: B, D, P, UK;
- religious bodies: UK;
- advertising agencies: UK.